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THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

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ERRATA.

[1942] A. C. 384, footnote (3) : for " [1915]" read " [1917] "

[1942] A. C. 507, l. 12 : for " Lord Macdonald " read " Lord Justice Clerk Macdonald."

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

Applied. R. *v.* SEMINI. [1949] 1 K. B. 405

[HOUSE OF LORDS.]

MANCINI . . . . APPELLANT;

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT.

H. L. (E.)*

1941

Oct. 2, 3, 16.

Criminal law—Murder—Provocation—Reduction of crime to manslaughter—Summing-up—Duty of judge.

On the trial of a person charged with murder it is the duty of the judge in his summing-up to deal adequately with any view of the evidence given which might reduce the crime to manslaughter. The fact that the defending counsel may not have stressed the possibility of such an alternative case does not relieve the judge from directing the jury to consider it, if there is material which justifies such a direction, but the possibility of a verdict of manslaughter instead of murder arises only when the evidence is such as might satisfy the jury as the judges of fact that the elements are present which would so reduce the crime, or might induce a reasonable doubt whether this may not be the right view. Every kind of provocation, however, will not reduce the crime to manslaughter. To have that effect the provocation must be such as temporarily to deprive the person provoked of the power of self-control, as the result of which he commits the act which causes death. The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did. It is

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* *Present:* VISCOUNT SIMON L.C., VISCOUNT SANKEY, LORD RUSSELL OF KILLOWEN, LORD WRIGHT and LORD PORTER.

H. L. (E.)

1941

MANCINI
v.
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS.

important to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable person time to cool, and account must also be taken of the instrument with which the homicide has been effected. The mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

Dictum of Lord Reading C.J. in *Rex* v. *Hopper* [1915] 2 K. B. 431, 435, approved.

Woolmington v. *Director of Public Prosecutions* [1935] A. C. 462, discussed and explained.

Decision of the Court of Criminal Appeal affirmed.

APPEAL from the Court of Criminal Appeal.

The appellant was found guilty at the Central Criminal Court of the murder of one Distleman and was sentenced to death, that sentence being affirmed by the Court of Criminal Appeal.

At the material time the appellant was the manager of the Palm Beach Bottle Party, which had club premises in Wardour Street, W. Distleman was a member of the club, and in the early morning of May 1, 1941, the appellant inflicted on him a fatal wound, the nature of which showed that it must have been caused by an instrument with a two-edged blade. At the trial the appellant set up the plea of self-defence. He admitted that he had such an instrument in his pocket, and he said that in some fighting or struggling which took place in the club he was attacked by Distleman, whereupon in self-defence he drew the blade from his pocket and struck out blindly without aiming at any particular person, but in fact he inflicted a blow on Distleman which proved fatal shortly afterwards. The jury found the appellant guilty of murder. An appeal against the conviction was dismissed by the Court of Criminal Appeal, but the Attorney-General gave his certificate that the decision of that court involved a point of law of exceptional public importance, and that, in his opinion, it was desirable that a further appeal should be brought. Accordingly, this appeal came before the House.

Hector Hughes K.C. and *F. D. Levy* for the appellant. The trial judge did not sufficiently direct the jury on the question of provocation by Distleman, of which there was abundant evidence. He should have pointed out to the jury the facts as to provocation and should have directed them that if the act was provoked the appellant could not be convicted of murder. We rely on the rule enunciated by Lord Sankey in *Woolmington* v. *Director of Public Prosecutions* (1), that "if "the jury are either satisfied with his [the prisoner's] "explanation or, upon a review of all the evidence, are left "in reasonable doubt whether, even if his explanation be not "accepted, the act was unintentional . . . . the prisoner is "entitled to be acquitted." We also rely on *Rex* v. *Hopper* (2), where Lord Reading C.J. said (3): "We do not assent to the "suggestion that, as the defence throughout the trial was "accident, the judge was justified in not putting the question "as to manslaughter. Whatever the line of defence adopted "by counsel at the trial of a prisoner we are of opinion that it "is for the judge to put such questions as appear to him "properly to arise upon the evidence, even although counsel "may not have raised some question himself. In this case "it may be that the difficulty of presenting the alternative "defences of accident and manslaughter may have actuated "counsel in saying very little about manslaughter, but if we "come to the conclusion, as we do, that there was some "evidence . . . . upon which a question ought to have "been left to the jury as to the crime being manslaughter "only, we think that this verdict of murder cannot stand." In this case the judge omitted to give the jury any proper definition of provocation. All that was said on the subject was vague and indeterminate.

Sir Donald Somervell A.-G., *G. B. McClure* and *Christmas Humphreys* for the respondent. Where there is evidence of an intentional act which causes death and provocation is not established, there is no onus on the prosecution to negative provocation, nor is there any duty on the judge at the trial to direct the jury to speculate as to incidents which, if they had occurred, could have been, but were not, put in evidence. In this case the jury were clearly told that, if they had any reasonable doubt, the offence would either be reduced to manslaughter or there would be no offence at all. The facts show that the appellant was the aggressor. Complaint has been made of the summing-up, but the only criticism to which it is subject is that it was unduly favourable to the appellant. To justify the use of a lethal weapon the circumstances must indeed be grave, and here there was no justification at all.

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(1) [1935] A. C. 462.
(2) [1915] 2 K. B. 431.
(3) Ibid. 435.

Hughes K.C. replied.

The House took time for consideration.

1941. Oct. 16. VISCOUNT SIMON L.C. My Lords, on July 4, at the Central Criminal Court, the appellant, Antonio Mancini, was found guilty by the jury of the murder of Harry Distleman, and was sentenced to death by the presiding judge, Macnaghten J. Mancini appealed on the ground of misdirection to the Court of Criminal Appeal where there were two hearings. The first took place on August 20 and as a result re-argument before a full court was ordered. The case was accordingly re-heard on September 3 before the Lord Chief Justice and four other judges, when the appeal was dismissed. On September 11 the Attorney-General, acting under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, gave his certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that, in his opinion, it was desirable in the public interest that a further appeal should be brought. Accordingly, the present appeal has come before this House. It is the third appeal on a conviction for murder to reach the House of Lords since the passing of the Criminal Appeal Act thirty-four years ago.

The appellant was the manager of an enterprise called the Palm Beach Bottle Party, with premises in the basement of 37 Wardour Street, W. On the ground floor of that building were the quarters of a club, on which nothing turns, and on the first floor there was housed the West End Bridge and Billiards Club, of which the appellant was a member. Distleman was also a member of this club, and between three and four o'clock on the morning of May 1, when he and a number of other members (including a man named Fletcher and Mancini himself) were on the premises, he received a fatal wound in the left shoulder. A main artery was severed. The nature of the wound established that it must have been caused by an instrument with a two-edged blade, with a sharp point and sharp sides, at least five inches long. The appellant at first told the police that he saw a dagger-knife on the floor and picked it up as Fletcher was advancing to strike him with a chair, but at the trial he admitted that he had such an instrument in his pocket—he described it as a knife about seven inches long—which he said he had bought some weeks previously because his life was threatened by gangs of roughs. He said that, in the course of fighting or struggling which took place among a number of persons present in the club, he was attacked by Distleman, when he drew the dagger from his pocket and struck out blindly, though without aiming at any particular individual.

There had been an earlier violent altercation in the club when the appellant was not present, as the result of which Fletcher sustained head wounds and had to go with his friend Distleman to Charing Cross hospital, where two stitches were put in. It was after this that he and Distleman returned to the club. There was evidence that Fletcher was at enmity with the appellant, owing to the latter having at an earlier date taken steps to exclude Fletcher from the Palm Beach Bottle Party. When Fletcher and Distleman re-entered the club and found the appellant there, the appellant, according to the evidence of the club doorkeeper, came across to Fletcher and seized him by the neck or top of the coat. Distleman went to Fletcher's aid, seized the appellant's shoulder or arm, and aimed a blow at him. It is at this point that the appellant whipped out his dagger and inflicted the fatal blow on Distleman, and a little later slashed Fletcher's hand so that he was severely cut. Distleman, mortally injured, made his way out of the room, but he collapsed at the bottom of the stairs and died in a few minutes. The appellant gave evidence that he threw his dagger away, and consequently this weapon was not forthcoming, but the police constable, who shortly afterwards came on the scene, found a small pocket-knife with its blade opened lying at the side of the dead Distleman in the doorway leading to the street. The pocket-knife was proved to have belonged to the dead man, but how it came to be lying open beside him at the bottom of the stairs was not explained. Shortly after these events the appellant decided to go to the police and make a statement, but at that time he was not aware of the discovery of Distleman's pocket-knife, and, while he described his own action as taken in self-defence, he made no mention whatever of a knife in Distleman's hand. Indeed, in his first statement to the police, he made no mention of any attack on him by Distleman at all. At the trial, however, after hearing the police evidence, he amended his previous story and declared that Distleman attacked him with the open pen-knife, and that when coming up the stairs to enter the club he had heard a voice behind him like Fletcher's saying: "Let's knife him." No other witness saw any knife in Distleman's hand, or heard Fletcher's previous remark, though it would appear that some of these witnesses, if their statements are correct, should have done so.

The main case set up on behalf of the appellant at the trial was self-defence, and the learned judge devoted the first portion of a very careful summing-up to this question. The appellant's counsel found no fault with this part of the judge's charge at all. It was in fact, if anything, too favourable to the appellant, for Macnaghten J. did not invite the jury to consider whether, even if it were true that the appellant was menaced with the pen-knife, that would justify the use of the appellant's terrible weapon so as to constitute a case of necessary self-defence, nor did the learned judge make any observations on the question whether the appellant could not have escaped from the threatened danger by retreating from the club. The learned judge was content that the jury should deal with the question of self-defence on the basis that, if they believed the appellant's story at the trial about Distleman advancing with the open pen-knife in his hand, they should return a verdict of "not guilty." The jury's verdict shows

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that they disbelieved the appellant's story. Self-defence by the use of so deadly a weapon could not be made out if the appellant was never threatened with the pen-knife, and the learned judge, accordingly, proceeded to charge the jury on the alternative view that, although, if the appellant was disbelieved, self-defence must be rejected, yet the circumstances might still justify the jury in returning a verdict of manslaughter rather than of murder. It is to a part of the learned judge's summing-up on this topic that objection is taken, and it is contended for the appellant that the language of Macnaghten J. was not in accord with the law laid down by this House in *Woolmington's* case (1).

Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it. Thus, in *Rex* v. *Hopper* (2), at a trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental, but Lord Reading C.J., in delivering the judgment of the Court of Criminal Appeal, said (3): "We do not assent "to the suggestion that as the defence throughout the trial "was accident, the judge was justified in not putting the "question as to manslaughter. Whatever the line of defence "adopted by counsel at the trial of a prisoner, we are of opinion "that it is for the judge to put such questions as appear to "him properly to arise upon the evidence, even although "counsel may not have raised some question himself. In

(1) [1935] A. C. 462. (2) [1915] 2 K. B. 431. (3) Ibid. 435.

"this case it may be that the difficulty of presenting the "alternative defences of accident and manslaughter may have "actuated counsel in saying very little about manslaughter, "but if we come to the conclusion, as we do, that there was "some evidence—we say no more than that—upon which a "question ought to have been left to the jury as to the crime "being manslaughter only, we think that this verdict of murder "cannot stand."

To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder, where the accused pleads not guilty, the judge must include in his summing-up to the jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or, at any rate, might induce a reasonable doubt whether this was, or was not, the case. Murder by secret poisoning, for example, does not give room for the defence that, owing to provocation received, the administration of the poison should be treated as manslaughter. On the other hand, if the defence to a charge of murder by poisoning was that the accused never administered the poison at all, the judge might very well be obliged to direct the jury on the alternative view that the administration was accidental, if the facts proved reasonably admitted this as a possible interpretation, even though the defence had not relied on the alternative.

In the present case, the appellant's counsel contended that the learned judge should have directed the jury as to what would amount to provocation sufficient to reduce the felonious act to manslaughter, and should have told them that, if they took the view that the appellant's act was provoked in this sense, they should acquit him of murder, and moreover that if, without being satisfied on the point, they felt a reasonable doubt whether the act was or was not so provoked, the appellant was still entitled to be acquitted of murder and should be found guilty only of manslaughter. All this, however,

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depends on the view that there was evidence before the jury which might, if believed, be regarded as amounting to sufficient provocation. It is here, I think, that the contention for the appellant breaks down.

It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self control, as the result of which he commits the unlawful act which causes death. "In deciding the question "whether this was or was not the case, regard must be had to "the nature of the act by which the offender causes death, "to the time which elapsed between the provocation and the "act which caused death, to the offender's conduct during "that interval, and to all other circumstances tending to show "the state of his mind": Stephen's Digest of the Criminal Law, art. 317. The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex* v. *Lesbini* (1), so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (*a*) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (*b*) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

Before, therefore, Macnaghten J.'s summing-up can be criticized on the ground that it did not deal adequately with the topic of provocation, we have to see what was the extent of the provocation as disclosed by the evidence which the jury had to consider, and for this purpose we have to exclude altogether the allegation made by the appellant that he heard the voice of Fletcher threatening him with "knifing," and that

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(1) [1914] 3 K. B. 1116.

Distleman came at him with an open pen-knife in his hand. The judge had already instructed the jury fully on these matters and had directed the jury to acquit the appellant altogether if they felt they could accept the appellant's story. The alternative case, therefore, as to which it is suggested that a defence of provocation was open, must be regarded on the basis that the appellant's story was rejected. In that view the only knife used in the struggle was the appellant's dagger, and this followed Distleman's coming at him and aiming a blow with his hand or fist. Such action by Distleman would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like this dagger, and there was, therefore, on the assumption that the appellant's evidence was rejected, no adequate material to raise the issue of provocation. The learned judge, indeed, in his summing-up never uses the word "provocation" as the ground on which a verdict of manslaughter might be based. The passage complained of in the summing-up runs as follows: "If you think that there was "such a disturbance going on, unprovoked by him—he was "not justified, of course, in using the dagger; assuming you "reject the plea of self-defence, that cannot be justified— "but if in the whole of the circumstances, as far as you know "them, having regard to the character of the people there, "and the sort of conduct which was going on in such a place, "you think that the blow may have been struck without any "premeditation and in the excitement of the disturbance, "whatever it was, it seems to me you might be justified in "returning the verdict of manslaughter." It seems probable that the judge in this passage was not referring to the defence of provocation, but rather had in mind the excuse which in the old books went by the name of "chance-medley": see, for example, Blackstone, Bk. IV., p. 184. But, however the defence may be classified, the verdict should not, in my opinion, be upset on the ground of the above extract from the judge's charge. It was argued that the judge, instead of saying that the jury "might" be justified, should have told the jury that, if they thought that the blow might have been struck without any premeditation and in the excitement of the disturbance, they "should" return a verdict of manslaughter. Such an argument refines too much. The sentence must be read as a whole, and a conviction ought not necessarily to be quashed by picking a quarrel with a single word. I am satisfied that a jury would not be misled by the judge's phrasing, and the word "might" is to be explained by the preceding use of the word "may." In my opinion, moreover, there was not sufficient evidence (once the story of being attacked with the pen-knife was discarded) to justify a verdict of manslaughter arising from the use of the dagger.

As regards the more general question with which the Attorney-General asks the House to deal, I would formulate the following propositions:—

(1.) *Woolmington's* case (1) is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it. The rule is of general application in all charges under the criminal law. The only exceptions arise, as explained in *Woolmington's* case (1), in the defence of insanity and in offences where onus of proof is specially dealt with by statute. Thus, when a prisoner is charged with murder and felonious homicide is proved against him, if the jury, when considering the evidence as a whole at the conclusion of the case, are left in reasonable doubt whether the homicide proved is not manslaughter, the jury should return a verdict of manslaughter. *Woolmington's* case (1) was one in which the defence to the charge of murder was that of pure accident in circumstances not alleged to amount to criminal negligence. The prisoner gave evidence to that effect and my noble and learned friend, Lord Sankey, lays it down that "if the jury are either satisfied with his "explanation or, upon a review of all the evidence, are left in "reasonable doubt whether, even if his explanation be not "accepted, the act was unintentional . . . . , the prisoner is "entitled to be acquitted." A proposition to the same effect, but in different language, had been laid down by Lord Reading C.J., in connection with a charge of receiving recently stolen goods, in *Rex* v. *Abramovitch* (1), and was approved in the *Woolmington* decision (2). The law on this subject is thus finally established and is, I think, perfectly clear.

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(1) [1935] A. C. 462, 482.

(2.) The language employed by Lord Sankey does not assert and does not imply that in every charge of murder, whatever the circumstances, the judge ought to devote part of his summing-up to directing the jury on the question of manslaughter or the jury ought to consider it. If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing-up that manslaughter is not dealt with. Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or jury went outside it.

(3.) There is no prescribed formula for summing-up in a trial for murder, but the essential rules on this particular matter are as above stated. A good example of the proper direction is, as this House in *Woolmington's* case (2) pointed out, that of Finlay J. (as he then was) at the ~~abortive~~ trial.

(4.) Our attention was called to the recent decision of the Court of Criminal Appeal in *Rex* v. *Prince* (3), where the court reduced the jury's verdict of murder to manslaughter on the ground that the trial judge did not give a direction to the jury in accordance with the decision in *Woolmington's* case (2). *Prince's* case (3) was one in which the defence pleaded that there was provocation sufficient to reduce the charge to

(1) (1914) 11 Crim. App. Rep. 45, 49.

(2) [1935] A. C. 462, 467.

(3) [1941] 3 All E. R. 37.

manslaughter. The Court of Criminal Appeal must have proceeded on the view that the jury were not adequately directed that reasonable doubt whether such provocation existed, as opposed to confident assurance that it did, was sufficient to require the milder view to be taken. There is no reason to repeat to the jury the warning as to reasonable doubt again and again, provided that the direction is plainly given.

(5.) In *Woolmington's* case (1), the sentence already quoted, which ends " the prisoner is entitled to be acquitted," should, of course, be understood as meaning " the prisoner is entitled "to the benefit of the doubt." If the jury are left in reasonable doubt whether the act was " unintentional," i.e., a pure accident without criminal negligence, the verdict should be not guilty. If they are left in reasonable doubt whether the act was " provoked," i.e., perpetrated under the impulse of provocation as above defined, the prisoner should be found guilty of manslaughter.

My Lords, the House, in dealing with these unusual appeals in a criminal case, confines itself entirely to questions of law. The conclusion on the facts is for the jury, and the decision as to punishment rests elsewhere. There is no error of law in Macnaghten J.'s summing-up which would justify the House in allowing the appeal and I, therefore, move that the appeal be dismissed.

VISCOUNT SANKEY. My Lords, I entirely agree.

LORD RUSSELL OF KILLOWEN. My Lords, I also agree.

LORD WRIGHT. My Lords, I also agree.

LORD PORTER. My Lords, I concur in the reasoning of, and the result arrived at by, the noble Lord on the Woolsack.

Appeal dismissed.

Solicitors for appellant: *Addis, Edwards & Co.*
Solicitor for respondent: *Director of Public Prosecutions.*

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(1) [1935] A. C. 462, 482.

[HOUSE OF LORDS.]

H. L. (E.)* BOMFORD . . . . APPELLANT;

1941

AND

Feb. 27, 28; OSBORNE (INSPECTOR OF TAXES) . . . RESPONDENT.
Mar. 3;
May 27.

Revenue—Income tax—Occupation of lands—Profits arising from lands occupied as . . . . gardens for the sale of the produce—Mixed farm—Divisibility—Practice—Form of special case stated by commissioners—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 149, *sub-s.* 1 (*d*); *Sch. B*, *r.* 8.

While a defined area which is not fenced round may be "gardens" for the purposes of r. 8 of Sch. B to the Income Tax Act, 1918, so long as it is a distinct and separate entity devoted to gardening, a field of farming land should not be called "gardens" merely because it grows products which used to be those characteristic of gardens, or even products which are still mainly or largely found in gardens. The main test whether lands are occupied as "gardens" within the meaning of the rule is that the defined area has some degree of fixity and local continuance and is subject to that kind and intensity of treatment which is characteristic of horticulture.

A single holding can be split into two parts with a view to applying r. 8 to one part of it while leaving the other part to be assessed under the ordinary provisions of Sch. B provided that the part which is "occupied as . . . . gardens for the sale of "the produce" is distinct and separate from the other part. But (per Lord Maugham) prima facie a mixed farm is a single assessable unit and strong reasons must exist to justify dividing it for purposes of assessment.

Observations on the form of a special case stated by Commissioners of Income Tax.

Monro and Cobley v. *Bailey* (1933) 102 L. J. (K. B.) 471; 17 Tax Cas. 607; and *Dennis* v. *Hick* (1935) 19 Tax Cas. 219, distinguished. *David Lowe & Sons, Ld.* v. *Inland Revenue Commissioners* (1938) 21 Tax Cas. 597 discussed.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal.

The appellant occupied a mixed farm of 536 acres of land as to which the General Commissioners of Income Tax decided that the arable portion (except that used for the growth of hops), amounting to 229 acres, should be separately assessed for the year ended April 5, 1937, being "lands occupied as

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**Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD PORTER.

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" . . . . gardens for the sale of the produce " under Sch. B, r. 8, of the Income Tax Act, 1918, while the rest of the holding should pay tax under that schedule in the ordinary way by reference to assessable value. The appellant appealed by case stated to the High Court, where Lawrence J., who, if he had felt free to give effect to his own opinion, would have decided in favour of the appellant on the ground that the facts before the commissioners did not justify the separate assessment, felt constrained by the decision of the Court of Session in *David Lowe & Sons, Ld.* v. *Inland Revenue Commissioners* (1) to decide in favour of the Crown. He, however, struck out of the area classed as " gardens " twenty-six acres of arable land carrying wheat, parsnips, mangolds, and lucerne on the ground that there was no justification for holding that this land was " ancillary " to the garden. On an appeal by the Crown, the Court of Appeal held (Clauson and Goddard L.JJ., Scott L.J. dissenting) that the general commissioners were right in deciding that the whole of the 229 acres should be separately assessed, and they, therefore, allowed the appeal.

The appellant appealed to this House.

Miller K.C. and *Graham-Dixon* for the appellant. On the facts found it is not permissible to split up the holding into two parts. The appellant occupied a mixed farm as one unit over which mechanized operations took place. The legislature never intended that one unit should be split up : see per Lord Cullen in *Keir* v. *Gillespie* (2). Even assuming that we are wrong as to this, there is no evidence to justify the contention that the arable portion constitutes " gardens " within the meaning of r. 8.

Sir Donald Somervell A.-G. and *R. P. Hills* for the respondent. Of this arable land a very large proportion was devoted to the growing of vegetables. That is not the general rule in farming. In *Monro and Cobley* v. *Bailey* (3) 200 acres of land consisting of open fields for the growing of bulbs, potatoes, and ordinary farm crops, worked as one farm by farm labourers using

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(1) (1938) 21 Tax Cas. 597.

(2) (1919) 7 Tax Cas. 473.

(3) (1933) 102 L. J. (K. B.) 471; 17 Tax Cas. 607.

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ordinary methods of husbandry, were found by the general commissioners to be occupied as "nurseries or gardens for "the sale of the produce" and it was held by this House that the commissioners were entitled to arrive at that conclusion of fact and that the land was to be assessed under r. 8 of Sch. B. In deciding whether land is to be treated as a market garden or not the test is whether as a whole it is cultivated predominantly for the growth of vegetables which eventually are sold to greengrocers and by them to customers in their shops. The use of the land in the present case shows occupation as a market garden. The question is one of fact on which the decision of the commissioners is final.

Miller K.C. replied.

The House took time for consideration.

1941. May 27. VISCOUNT SIMON L.C. My Lords, the question to be decided arises on a case stated by general commissioners under s. 149 of the Income Tax Act, 1918. The appellant occupies about 550 acres of land in the Pershore district of Worcestershire, and the commissioners reached the conclusion that the arable portion of the land (except that used for the growth of hops), amounting to about 230 acres out of the whole, should be separately assessed, for the year ended April 5, 1937, as "gardens" under r. 8 of Sch. B., while the rest of the holding should pay tax under that schedule in the ordinary way by reference to assessable value.

The case came before Lawrence J. who, if he had felt free to give effect to his own opinion, would have decided in favour of the taxpayer on the view that the facts before the commissioners did not justify the separate assessment. The learned judge, however, considered that he was constrained by the decision of the Court of Session in *David Lowe* v. *Inland Revenue Commissioners* (1) to decide in favour of the Crown, but he struck out of the area classed as "garden" some twenty-six acres of arable carrying wheat, parsnips, mangolds, and lucerne on the ground (with which I thoroughly agree)

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(1) 21 Tax Cas. 597.

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that there was no justification for holding that this land was "ancillary" to the garden. In the Court of Appeal there was a difference of opinion. Clauson L.J. and Goddard L.J. took the view that the General Commissioners were justified in deciding against the taxpayer, while Scott L.J. in an elaborate judgment, involving both historical research and a full examination of the earlier cases which might bear on the matter, was of a contrary opinion. The taxpayer now appeals to this House.

Rule 8 of Sch. B runs as follows: "The profits arising from "lands occupied as nurseries or gardens for the sale of the "produce (other than lands used for growth of hops) shall be "estimated according to the provisions and rules applicable "to Sch. D. but shall be assessed and charged under this "Schedule as profits arising from the occupation of lands." As Scott L.J. points out, the substance of this rule, so far as it applies to gardens, may be traced back to its origin in Addington's Income Tax Act, 1806. At that distant date, and for long afterwards, it may be presumed that the distinction between gardens and farm land was easily made. "Gardens "for the sale of the produce" were market gardens, usually situated near large towns, cultivated for the most part by spade, rake, and hoe, and growing characteristically garden crops. Scott L.J.'s researches and quotations make this plain. The qualification "for the sale of the produce" is manifestly inserted so as to exclude from the rule gardens where produce is grown for the supply of an adjoining house, belonging to the same occupier, or gardens where the profit is made by charging the public for admission. But a great change has come over the face of the country since 1806 in this respect, with the result that the distinction between garden and farm is not now so easy to draw. In consequence of a greater variety of products grown on farms, a better knowledge of the principles governing rotation of crops, and a revolution in transport as the result of which Covent Garden and similar markets can be supplied in bulk from a great distance with vegetables and fruit, much of the produce which was at one time confined to gardens may now be part of the output of a farm. The cultivation in open fields with a view to sale of what in earlier days would be regarded as a characteristically garden product cannot in itself justify the conclusion that such fields have become "gardens." Etymologically, the word appears to imply that the ground is enclosed, and in common understanding a method and intensity of cultivation specially suitable to an area set apart for horticulture is part of the general conception.

The present appeal, however, can be decided without adventuring upon the difficult task of precise definition. I am quite prepared to accept the view that a defined area may be a "garden" for the purposes of r. 8, even though it is not fenced round, as long as it is a distinct and separate unity devoted to gardening. On the other hand, as I have already said, a field, or fields, of farming land should not be called a "garden" merely because they grow products which used to be characteristic products of gardens, or even products which are still mainly or largely found in gardens. The main test, in my opinion, is that the defined area should be subject to that nature and intensity of treatment which is characteristic of horticulture.

The commissioners set out in a series of lettered paragraphs running from (A) to (R) the facts which were proved or admitted before them, and in order that my judgment may be complete and self-contained I must reproduce these paragraphs in extenso.

"(A) For the year in question the appellant was the "occupier of 550 acres. (i.) Part of the land at Springhill and "the land at Fingerpost Ground and Lower Moor was arable "(excluding land utilised for the cultivation of hops) on which "the following crops were growing during 1936: 16 acres "wheat; 7 acres potatoes; 3 acres mangolds; ½ acre lucerne; "26½ acres peas; 18½ acres beans; 44½ acres brussels sprouts; "4 acres savoys; 18½ acres cauliflower; 3½ acres leeks; "4 acres carrots; 6 acres parsnips; 2 acres asparagus; 5 acres "plants; 1 acre rhubarb; 17 acres plums; 1½ acres black-"currants; 32 acres strawberries; 5 acres raspberries; "2 acres loganberries; 11½ acres fallow. (ii.) The remainder "of the land at Springhill and land at Willspit consisted "of: 82 acres mowing grass; 178½ acres grazing; 40 acres "hops; 7 acres osiers.

"(B) The following live stock was kept by the appellant: "16 horses; 90 cattle; 232 sheep; 1012 pigs; 8045 poultry. "The horses worked on the farm. Cattle, sheep, pigs, and "poultry were produced and bred by the appellant on the land.

"(C) The whole acreage occupied by the appellant was "worked as a single mixed farm in one unit. The appellant "employed ordinary farm labourers who were not highly "skilled.

"(D) The appellant used very up-to-date appliances and "practised mechanised farming over the whole farm. The "minimum amount of hand labour was used in producing "crops on the arable land, much of it being machine planted "and machine hoed.

"(E) The appellant was a registered producer under the "Pigs Marketing Scheme.

"(F) Wheat was grown on 16 acres of the arable land, "partly to obtain the subsidy payable under the Wheat Act "and partly to provide straw litter for the pigs. The mangolds, "parsnips and lucerne were grown to provide feed for the "stock and horses.

"(G) The live stock, pigs, and poultry, were kept not for "the purpose of their providing manure for the arable and "pastoral land but for fattening and sale.

"(H) During the winter the poultry had access to the "arable land.

"(I) The purchases and sales of live stock in 1936 were "5386*l.* 1*s.* 6*d.* and 22,147*l.* 10*s.* 7*d.* respectively.

"(J) The wages for the year amounted to 9684*l.* 17*s.* 10*d.* "A big proportion of this expenditure was incurred in relation "to the pigs and hops. The numbers of regular employees "were 80 men and 29 women. These workers worked indiscriminately on the whole farm whether on the sheep, pigs, "cattle and poultry or on the pasture and/or the arable land, "often being engaged on different parts of the farm at different "times in the same day.

"(K) The cost of labour over the whole farm was 12*l.* "per acre and for the land on which fruit and vegetables were "grown 18*l.* per acre.

"(L) The purchases of artificial manures amounted to "1471*l.* 8*s.* 6*d.* only and had been progressively reduced year by "year as the manure produced by the pigs increased.

"(M) The purchase of feeding stuffs amounted to "10,939*l.* 4*s.* 2*d.*

"(N) There are no glasshouses on the land occupied by "the appellant and no nursery work was done on any part of "the land.

"(O) The methods of cultivation were the ordinary "accepted agricultural methods.

"(P) The appellant styles himself a farmer and fruit and "vegetable grower on his notepaper and bill heads.

"(Q) Some of the produce of the land used for growing "fruit and vegetables was sold in various towns through an "agent in the usual manner in the district.

"(R) To obtain continuity of supplies not always possible "from the appellant's own land, produce is sometimes obtained "from other growers and sold by the appellant under commission."

After setting out the rival contentions, the commissioners then express their conclusion in the following terms: "We, "the commissioners, have come to the conclusion that the lands "occupied by the appellant can be divided for purposes of "assessment under Sch. B, and accordingly find as a fact: "(1.) That the farming operations on the arable land (apart "from that used for the growth of hops) are ancillary to the "market garden operations; (2.) That the whole of the arable "land (apart from that occupied for the growth of hops) is "occupied as gardens for the sale of produce; (3.) That the "remainder of the land occupied by the appellant is devoted "to farming operations and is assessable under the ordinary "rules applicable to Sch. B. The appeals will, therefore, be "dismissed as far as the principles at issue are concerned, but, "in arriving at this decision, the commissioners are not "confirming the amount of the assessments, and, in the event "of the actual liability of the year in question not being agreed "between the Inspector of Taxes and the appellant, the appeals "are to be regarded as being kept open for the question "of the amounts of the liability to be argued before the "commissioners."

The first question that arises is whether it is in point of law competent to "split" a single holding into two parts with a view to applying r. 8 to one portion of it, while leaving the other portion to be assessed under the ordinary provisions of Sch. B. The possibility of this was affirmed by the Court of Session in *David Lowe & Sons, Ld.* v. *Inland Revenue Commissioners* (1) and was recognized by Finlay J. in the course of his judgment in *Dennis* v. *Hick* (2). I accept the possibility of such a division of a unit of occupation, provided that the distinction between the portion which is "occupied as gardens for the "sale of the produce" and the separate portion which is not so occupied is really made out. But in the present case, the facts found in paragraphs (A) to (R) do not, in my opinion, justify such splitting. As Scott L.J. pointed out, there is nothing in the findings of the commissioners to indicate that the fields, which they added together and pronounced to be occupied as "garden," were not scattered over the whole holding, so as to be interspersed with mowing grass or pasture fields, and the learned Lord Justice goes on: "Indeed, it was common "ground, as we were informed, that the arable fields were in "fact so interspersed." Moreover, an area which is to be classed as "garden" must have a certain permanence as such, for the assessment of profits under r. 8 is by reference to the profits of the preceding year, and was formerly by reference to the average of three preceding years. If a field is subject to rotation of crops so that last year it was part of the ordinary farm but this year is pronounced by the commissioners to be a "garden," merely because it is this year producing what they regard as a garden crop, there would be no past profits of the "garden" on which the assessment under r. 8 could be fixed. In short, a "garden" within the meaning of r. 8, whatever else the word implies, must have some degree of fixity

(1) 21 Tax Cas. 597. (2) (1935) 19 Tax Cas. 219, 228.

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and local continuance and cannot come and go over different portions of the area according to the system of rotation employed.

I wish now to make an observation on the way in which the case is stated. It is important for commissioners, in drawing up a case for the High Court always to bear in mind that under s. 149 the case is required in order to challenge the determination of the commissioners " as being erroneous in point of law." By sub-s. (*d*) of s. 149 the case is required to " set forth the "facts and the determination of the commissioners," and the "determination " is the decision of law at which the commissioners have arrived on the facts proved or admitted before them. It is, of course, only a determination on a question of law which is liable to be corrected by the High Court. The commissioners' statement of the facts is final. The High Court can only discharge its proper function in dealing with a case stated if the contents of the case show with reasonable clearness what is the question of law, if any, which arises. Now, in the present instance (and the practice is not uncommon), the commissioners, after carefully setting out exhaustively the facts proved or admitted, proceed in a subsequent paragraph to state their own conclusions as a finding of fact. Presumably, the commissioners mean to say that they deduce from the facts which were proved or admitted the three conclusions stated in paragraph 5 and that they regard these conclusions as matters of fact. No doubt, there are many cases in which commissioners, having had proved or admitted before them a series of facts, may deduce therefrom further conclusions which are themselves conclusions of pure fact, but in such cases the determination in point of law is that the facts proved or admitted provide evidence to support the commissioner's conclusions. I think it would tend to clearness, and be in closer correspondence with the intentions of s. 149, if commissioners in such a case as this would state that the question of law is whether the facts found or admitted can support their further conclusions of fact. This preferable way of stating a case in such circumstances has often been followed, e.g., in *David Lowe & Sons, Ld.* v. *Inland Revenue Commissioners* (1).

(1) 21 Tax Cas. 597, 603.

Coming now to the three numbered conclusions which the commissioners consider they can, and should, deduce from paragraphs (A) to (R), the first conclusion seems to me entirely unsupported by the facts found. The contention that operations on an adjoining area are "ancillary" to the market garden operations appears to be copied from a contention of the inspector of taxes in *Dennis* v. *Hick* (1), where the contention succeeded. But that was a case where 263 acres were found to be a garden, partly in view of the high cost of labour employed there, partly because of heavy manuring, and partly because of the nature of the crops. Finlay J. felt that he could not interfere with this conclusion of fact, and the learned judge further held that there was evidence to support the conclusion that the use of the remaining land was ancillary to, i.e., subservient to, and intended to assist, the market gardening business. In the present case there appears to me to be no such supporting evidence at all, for the wheat was grown partly to obtain the subsidy under the Wheat Act and partly to provide straw litter for the pigs, while the mangolds, parsnips and lucerne were grown to provide feed for the stock and horses. Thus the facts found go to show that the area, which the commissioners deduce to be ancillary to the so-called garden, is in fact ancillary to the other part of the farm, which they admit is not garden at all.

The remaining conclusion of the commissioners raises the question whether the facts proved or admitted can justify the view that the remainder of the arable land was "garden." Reading the findings as a whole, and applying the test above indicated that a "garden" implies, amongst other things, the use of special and intense methods of cultivation, I cannot discover how the facts could sustain the commissioners' conclusion. The decision on this issue in *David Lowe & Sons, Ld.* v. *Inland Revenue Commissioners* (2) which influenced Lawrence J. in rejecting the appeal, appears from the judgments to have largely turned on an admission by counsel for the taxpayer. The Lord President says (3):

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(1) 19 Tax Cas. 219.
(2) 21 Tax Cas. 597.
(3) Ibid. 604.

"Counsel for the appellants admitted that, if the use of land "for growing vegetables such as these for sale for human "consumption can be regarded as a use of the land as a garden "for the sale of the produce within the meaning of r. 8, he "would have found it difficult to maintain that these lands, "if they had been the only lands cultivated by the appellants, "had not been properly assessed under r. 8," and Lord Fleming (1) states that the first reason advanced against the assessment of the lands as garden was " that the produce "grown on them was used for human consumption." On this point I can well understand that the appeal failed, for it would seem a curious reason for declining to call a garden by that name to say that it was growing vegetables for human consumption instead of flowers and fruit. The reports in the Tax Cases, useful as they are, do not as a rule give even the briefest outline of the contentions of counsel, and it is, therefore, sometimes difficult to make sure what is the meaning of the reference which judges make to counsel's argument. But in any case it is, in my opinion, clear that the decision in *David Lowe & Sons, Ld.* v. *Inland Revenue Commissioners* (2) on this point does not embarrass the present appellant.

There remains to be examined the decision in *Monro and Cobley* v. *Bailey* (3), which is the only previous decision on r. 8 pronounced by the House of Lords. That was a very special case. The holding was devoted to the growing of bulbs for sale, and, as a secondary matter, to the growing and selling of flowers produced by the bulbs while so growing. The cost of the labour employed on the bulbs amounted to more than three times per acre of the price of ordinary farming. There was evidence on which the commissioners could find, and did find, that the part of the area not actually occupied with the growing of bulbs was none the less part of one entire holding in which the purpose of producing bulbs predominated. Lord Buckmaster pointed out (4) that the taxpayers limited their bulb growing to sixty acres " because

(1) 21 Tax Cas. 597, 606.
(2) Ibid. 597.
(3) 102 L. J. (K. B.) 471; 17 Tax Cas. 607.
(4) 102 L. J. (K. B.) 474; 17 Tax Cas. 623.

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"it is necessary for change of soil and other reasons, that they "should use no more." I find no difficulty in distinguishing *Monro and Cobley's* case (1) from the present, and I, accordingly, move your Lordships that the present appeal should be allowed with costs here and below.

VISCOUNT MAUGHAM. My Lords, in this case there has been some difference of judicial opinion. Lawrence J. was in favour of the taxpayer, the present appellant, but thought he was bound by authority to decide in favour of the Crown. In the Court of Appeal Clauson L.J. and Goddard L.J. took the view that the general commissioners were justified in deciding against the appellant, but Scott L.J., in a very careful and elaborate judgment, was for deciding in the appellant's favour. The appeal seems to me to raise a question of considerable importance to a large number of farmers in this country, and I should like to say that counsel on both sides, by their able arguments, have rendered great assistance to the House.

The matter comes before your Lordships on a case stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the General Purposes of the income tax for the division of Pershore West, in the county of Worcester. The Lord Chancellor has fully set out the material paragraphs of the case. The question is whether the appellant was rightly assessed to income tax for the year ended April 5, 1937, in respect of a single mixed farm of some 550 acres by two separate assessments. The whole of the arable land (229 acres) was assessed by reference to the profits of the preceding year as being " lands occupied as nurseries or gardens for the sale " of the produce " within the meaning of r. 8 of Sch. B to the Income Tax Act, 1918. The remaining land, consisting mostly of mowing grass, grazing and hops (in all some 307 acres), was taxed by an assessment on the annual value in accordance with the general rule of Sch. B. This is clearly an unusual, if not an unprecedented, method of assessing a mixed farm which prima facie appears to be a single assessable unit, and, in my opinion, strong reasons must exist to justify

(1) 102 L. J. (K. B.) 471; 17 Tax Cas. 607.

such a course. The special case should state facts which are at least sufficient to justify the general commissioners in separating or splitting the farm into two areas and in treating one of the areas as a " garden for the sale of the produce."

I need not add anything to what the Lord Chancellor has said on this aspect of the case. The question which emerges is whether there are any facts stated in the case which justify the course which the commissioners took. That the whole farm is occupied and worked as a single unit appears clear from the following findings in the special case:

"(C) The whole acreage occupied by the appellant was "worked as a single mixed farm in one unit. The appellant "employed ordinary farm labourers who were not highly "skilled.

"(D) The appellant used very up-to-date appliances and "practised mechanised farming over the whole farm. The "minimum amount of hand labour was used in producing "crops upon the arable land, much of it being machine "planted and machine hoed . . . .

"(F) Wheat was grown upon 16 acres of the arable land, "partly to obtain the subsidy payable under the Wheat Act "and partly to provide straw litter for the pigs. The mangolds, "parsnips and lucerne were grown to provide feed for the stock "and horses . . . .

"(H) During the winter the poultry had access to the arable "land . . . .

"(J) . . . . The numbers of regular employees were 80 men "and 29 women. These workers worked indiscriminately upon "the whole farm, whether upon the sheep, pigs, cattle and "poultry or upon the pasture and/or the arable land, often "being engaged upon different parts of the farm at different "times in the same day . . . .

"(O) The methods of cultivation were the ordinary accepted "agricultural methods."

The case shows that the appellant carries on farming operations of various kinds. He keeps over a thousand pigs and over eight thousand poultry, as well as considerable numbers of sheep, cattle and horses. He buys and sells livestock. He grows and sells small fruit and a considerable quantity of vegetable produce not of the cereal kind. It is correctly described as a mixed farm. The occupation of each part derives benefit from the occupation of the other parts. For example, the manure produced by the pigs is used on the arable and no doubt is responsible for its fertility, and the wheat, parsnips, mangold and lucerne were grown to provide feed for the stock, and it may be added were, therefore, not within r. 8.

I should mention here that I propose for the sake of brevity to use the word " farm " as a synonym for lands " occupied " for the purposes of husbandry," which is the old-fashioned phrase still used in the Income Tax Acts. " Husbandry," in fact, means the business of a farmer. I shall make some remarks later as to the words " lands occupied as nurseries or " gardens for the sale of the produce " in r. 8, but I wish to observe here that that rule is obligatory. It seems to be clear that the nurseries or gardens for the sale of the produce must have boundaries capable of being definitely ascertained. Moreover, it is plain from r. 5 of Sch. B that a farm cultivated according to the usual custom and methods of farmers for the purpose of growing crops and other produce in the open as food for human beings and beasts cannot be a garden within r. 8. That follows from the fact that a man occupying lands for the purposes of husbandry only—that is, an ordinary farmer—has an option under r. 5 to be assessed and charged under Sch. D instead of under r. 1 of Sch. B. In contrast to this, r. 8 provides that the profits of the nurseries or gardens must in every case be assessed and charged under Sch. B as profits arising from the occupation of lands. The farm lands may thus be assessed and charged under Sch. D ; the nurseries and gardens must be assessed and charged under Sch. B. The conclusion is inevitable, that the two kinds of lands are quite distinct. Either a certain area is land " occupied as " nurseries or gardens for the sale of the produce," and is, therefore, to be taxed in relation to profits, or it is not. There must, therefore, be ascertained facts which lead the commissioners to class a particular area as " nurseries or gardens."

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A fortiori must this be so when the area in question is admittedly a portion of a single mixed farm worked in one unit. The commissioners have no discretion in the matter. I emphasize this because the decision in the Court of Appeal seems to be based on the view that what the commissioners say is "gardens," must be "gardens." Clauson L.J. says that the test is whether the locus in question is occupied as nurseries or gardens for the sale of the produce. With the greatest respect, this does not seem to me to be a test at all. It is the problem to be solved. The test, if it can be found, should determine whether the area is land occupied by a farmer taxable according to r. 1, or whether it is land "occupied "as nurseries or gardens for the sale of the produce" within r. 8. To say that the commissioners have applied the right test, in the absence of any statement by them, or by the court, as to what the test is, seems to me not to solve but to avoid the whole question. I find myself compelled to prefer the judgment of Scott L.J., who has, if I may respectfully say so, attacked the problem with equal care and erudition, and has given, if not a rigid test, at least one which is capable of being applied to the particular case which comes before us. I shall now state my reasons for agreeing with his conclusions.

The only fact, so far as I can see, which is alleged to justify the splitting of the farm into two separate units for the purposes of taxation is that considerable parts of the arable land were in the year of assessment used for growing crops of vegetables predominantly of a non-cereal character and some 57 acres for growing small fruit. I will take the vegetable area first. There are here found to be 16 acres of wheat, seven acres of potatoes, three acres of mangolds, half an acre of lucerne, 26½ acres of peas, 18½ acres of beans, 44½ acres of brussels sprouts, three and a half acres of leeks, four acres of carrots and six acres of parsnips. These, it will be remembered, are grown in the open, by ordinary accepted agricultural methods and by ordinary farm labourers who were not highly skilled and who work indiscriminately on the whole farm. I have mentioned these crops because it is common general knowledge that crops of

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this nature are and have for years past commonly been grown on ordinary farms in different parts of Britain where the soil is suitable for raising them. A reference to the Government Paper (Cmd. 2815) giving a return of the agricultural output for England and Wales, 1925, is sufficient to support this statement. It is for instance impossible to suggest that potatoes, peas and beans are not now just as commonly grown on farms as cereal crops, or for that matter as turnips, cabbages, rape, mustard and other cruciferous and leguminous crops. The crops I have mentioned occupy in this case 129½ acres out of 160 acres of arable land (apart from the land used for fruit and the fallow), which the commissioners have treated as "garden" within the meaning of r. 8.

There are some vegetables grown on the arable land as to which I do not think it can be asserted as common general knowledge that they are commonly grown by farmers as ordinary farm crops, though for all I know it is so. There are four acres of savoys, 18½ acres of cauliflower, two acres of asparagus, one acre of rhubarb, and in addition five acres of "plants" of which the nature is not stated. It seems to be impossible to regard this small proportion (some 30 acres) of a farm of 550 acres and an arable area of 229 acres as justifying the finding of the commissioners in a case where these crops are grown on a farm by ordinary farm labourers and in the open by ordinary agricultural methods. It is, in my opinion, quite wrong to suppose that crops like these, or newly introduced crops, raised for the purposes of food for man or beast, coming into vogue and capable of being, and in fact being, grown in the way described, afford any ground for asserting that the area on which they are grown can be singled out as a garden within r. 8. As for the 57½ acres of small fruit, it is well known that all these fruits, with the possible exception of the two acres of loganberries, are ordinary farm produce grown in the open in Kent and in various other counties where the conditions are favourable. In many counties there is hardly a farm to be found without its orchard, and it has become very common to grow small fruit for market in various counties, particularly in Kent and in

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Worcestershire. In my opinion, it is erroneous to think that crops which have been described as greengrocers' stuff and ordinary small fruits are not quite properly grown on an ordinary farm where ordinary agricultural methods are employed. Farming is an industry which changes with the times, with modern knowledge of soil cultivation, and with the needs of changing markets and new methods of distribution. It must be progressive or it will have little future prosperity. The mere fact that a farmer undertakes the raising of a new crop, such, for example, as sugar-beet was a few years ago, by ordinary methods, affords, in my opinion, no ground for the conclusion that the farm or the portion of it so employed is in any true sense a garden for the sale of produce.

In this connection it also has to be remembered that a farmer's business does not consist simply of raising crops in a single year of assessment. It is his duty to his landlord if he is a tenant, and I think also to the State itself, to do his best by his farming operations to preserve the fertility of the soil. I suppose most educated persons know something of various systems of rotation of crops, and of the advantages to the soil which may be obtained by the growing of certain non-cereal crops in certain soils, for example, by the growing of nitrogen-accumulating plants or of deep-rooting plants such as currants. It would be singular and very unfortunate if it could be held that the existence of such a crop in the year of assessment would justify the commissioners in treating the farm or a selected part of it as "gardens" within the rule. To avoid misconception I will state here that many of the crops I have referred to can be, and are, grown in market gardens. My point is that they are to a much greater extent grown on farms, and the mere fact that you find such crops on a piece of land does not prove that it is a garden rather than a farm. The matter, however, does not rest there. As Scott L.J. pointed out, the commissioners did not suggest that there was any physical separation which had enabled them to split the holding geographically into two self-contained units, and to decide that the whole of the arable land was not part of the farm, but was a garden for the sale of produce.

Indeed, the Lord Justice states that it was admitted in argument that arable fields were in fact interspersed with mowing grass or pasture fields. There are, however, two findings stated in the case to be findings of fact which are apparently supposed to justify the separation or splitting of the farm. The first is that the farming operations on the arable land (apart from that used for the growth of hops) are " ancillary " (which means " subservient ") to the " market " garden operations." The second is that the whole of the arable land (apart from that occupied for the growth of hops) is occupied as gardens for the sale of produce. I am at a loss to understand either of these so-called findings of fact. If the second were true there would be no need for the first. It is a finding that a certain large area is a garden. But it cannot in my opinion be reconciled with the findings in the special case which I have set out, unless we are to suppose that commissioners can at their pleasure pick out fields of wheat, potatoes, mangolds, peas, beans and so forth grown by ordinary agricultural methods on an ordinary farm and describe those fields collectively as " a garden for the sale of " produce." That depends on the true meaning of " gardens " in r. 8. The first finding is even more puzzling. How can operations on a garden for the sale of produce be " ancillary " to those same operations? For the words " market garden " operations " obviously mean operations carried on in " a " garden for the sale of produce."

I have carefully read the special case more than once and I am satisfied that the commissioners have decided that the arable land is " gardens " merely because of the nature of the produce. They could not I think have attached any importance to the cost of labour without some further finding as to the usual cost of labour on a highly mechanized farm using very up-to-date appliances and growing vegetable crops and fruit. Clauson L.J. uses the words " garden crops " as a description of the crops raised. This, for the reasons I have already given, seems to me with all respect to be misleading for most of them are common farm crops, but the Lord Justice indicates clearly that, if the only reason for deciding that an area is "gardens" is that it is concerned with "garden crops," that would not be sufficient. With that I entirely agree. He, however, comes to the conclusion that the commissioners must have had some other reason because they included in the so-called garden the 16 acres of wheat. As I have already said, a piece of land cannot be occupied, from the point of view of income tax, both as a farm and as a garden for the sale of produce at the discretion of the commissioners. It must be either one or the other. No facts are stated or suggested in the special case which go to show that the 16-acre field on which wheat was grown was part of a garden, or "ancillary" to a garden, within the meaning of r. 8. The fact that the commissioners thought that they could so describe that area seems to me a further reason for thinking that they were acting on a wrong view of the meaning of the words "nurseries or gardens."

In my opinion, it is impossible to define in precise language the meaning of the word "gardens" as used in the rules, and I have no intention of attempting the impossible. It is, however, possible to state the general nature of the various characteristics which go to make up such "gardens."

I have already pointed out the remarkable contrast between the effect of r. 5 and r. 8 in relation to the scheme of taxation. Next, I think some weight should be given to the fact that "gardens" are prima facie an area which is enclosed, and it is a little surprising that nothing in the case stated suggests such a separation, except that the whole arable area, including a wheat-field and all the fallow, is regarded as gardens. Then it is to be noted that r. 8 applies only to two kinds of lands, namely, "lands occupied as nurseries or gardens for the "sale of the produce (other than lands used for the growth "of hops)." Nurseries obviously require a very special kind of cultivation, and it is, I think, a probable conjecture that the legislature, when it in effect took nurseries and gardens for the sale of produce out of the general words of Sch. B and r. 1, did so because in both cases the method of cultivation was not that ordinarily used on a farm. I attribute weight also to the historical considerations which have been mentioned in the judgment of Scott L.J., which reinforce his view as to the meaning which should still be attached to the words now in r. 8. Further, I agree with him that the various Income Tax Acts must have been framed in the belief that nurseries and gardens would, normally at least, have some permanency of character, since the profits of such lands had formerly to be estimated on a three-years' average, and now under the Finance Act, 1926, have to be estimated on the yield of the preceding year. Peas, beans and so forth grown on a farm may occupy lands which were occupied during the preceding year by cereals, or for grazing. It will be understood that I am only dealing with the characteristics of " gardens " and am not suggesting that any one of the matters I have mentioned is conclusive.

My Lords, in my opinion, far the most important distinctive quality which differentiates " gardens " within the rule from a farm taxable under r. 1 is the mode of cultivation employed. It is the character and nature of the operations on the land which mainly determine whether or not it is within the phrase "gardens for the sale of the produce." I agree with Scott L.J. that the distinction between " farm " and " gardens " may be expressed in general words as the difference between lands cultivated by agricultural methods and lands on which horticultural methods are employed. Produce which requires the attention of skilled men would generally be found grown in a garden. The use of the plough in such a place would be something of a rarity. The soil in the garden would usually be prepared by the employment of the homely spade and the tiresome operation of trenching and digging in manure. At any rate I am confident that that was the case when the words " gardens " for the sale of the produce " were employed in the early Acts relating to income tax. Certainly, hand labour would usually be employed, and it would be very unusual if (as in this case) the land was for the most part both machine-planted and machine-hoed. It is not altogether irrelevant to note that in the census returns gardeners and nurserymen and " gardeners labourers " are enumerated separately from " agricultural labourers." The greater care employed in raising

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vegetables in a market-garden generally results in better shape and quality in the produce. Peas and beans, as I have pointed out, may be grown both on farms and gardens, but they will not usually have quite the same taste and quality.

My Lords, the occupier of a farm carried on as a single unit must prima facie be entitled to be taxed as if it were a unit. It is in fact a unit of occupation. As pointed out above, he is entitled if he pleases to be assessed and charged under Sch. D, and this must prima facie be on the whole of his profits and gains. I think this follows from Sch. D, Cases I. and II., r. 16, which provides that his statement of profits must include every source of income and that he shall be chargeable in respect of the whole of the tax so chargeable in one and the same division. The proviso relates to a person engaged in different trades in different places, which, of course, is not the case here. I am not doubting that there might be in a proper case a separation of lands occupied as a "gardens for "the sale of the produce" from the farm lands, but I am of opinion that the necessity for the separation must be clearly established.

It is desirable to make a few remarks on two of the authorities which have been cited. *Munro and Cobley* v. *Bailey* (1) was decided by this House. It related to a holding of some 200 acres occupied mainly for the purpose of growing bulbs. It seems to me widely different from the present case. Bulb-growing, like flower-growing, is a very special use of land. The method of cultivation is a special one. The main question in the case was whether an area not used for growing bulbs was properly held to be used for a purpose ancillary to the bulb-growing, and it was held that there was sufficient evidence to justify the commissioners in taking that view. I do not think that case throws light on the present appeal. The other case is *Dennis* v. *Hick* (2). The crops grown were vegetable crops as opposed to cereals, and a small amount of stock was raised, but most of the work on the crops was done by hand—for example, sowing in seed-beds,

(1) 102 L. J. (K. B.) 471; 17 Tax Cas. 607.

(2) 19 Tax Cas. 219.

grading, washing and packing, and the manuring was much heavier than on ordinary farm-lands. Moreover the taxpayer frankly admitted that he carried on the business of a market gardener. Finlay J. (as he then was), not without some doubt, held that there was evidence to justify the commissioners in finding that the whole area was occupied as a garden for the sale of produce within r. 8. I will only add with respect that with the same modicum of doubt I should have come to the same conclusion. That case can certainly be distinguished from the one before us.

My Lords, I do not wish to be understood as saying that a farmer cannot carry on ordinary farming and at the same time carry on the business of "gardens for the sale of the "produce" on a distinct area adjacent to or situate within his holding, so that, as regards the latter, he would be taxable under r. 8. I do, however, express the opinion that it is wholly erroneous to select from the area of a farm occupied and worked in one unit, which is used for raising crops and small fruits predominantly of kinds grown by farmers all over the country, the land being cultivated by ordinary agricultural methods and by ordinary agricultural labourers working indiscriminately on the whole farm, and to give to the selected portion the name of "gardens for the sale of the produce." To my mind there is no finding of fact in the case stated which justifies such a conclusion. On the contrary, I think that the findings of fact to which I have more than once referred lead only to the conclusion that the arable land is part of a mixed farm used for the purposes of husbandry and cannot be brought within r. 8.

For the above reasons I think this appeal should be allowed, and I agree with the motion proposed by the Lord Chancellor.

My Lords, I have been asked by my noble and learned friend, Lord Russell of Killowen, to state that he concurs in the opinion which I have delivered.

LORD WRIGHT. My Lords, this appeal comes to your Lordships upon a case stated by General Commissioners of Income Tax under s. 149 of the Income Tax Act, 1918, for the opinion of the court. The appellant, who was assessed for the tax, declared his dissatisfaction with the decision of the commissioners as being erroneous in point of law.

The question of law involved is whether the appellant was correctly assessed as occupying lands as "gardens for the "sale of the produce" under r. 8 of Sch. B to the Act. His claim is that he ought to be assessed under the general rule of Sch. B as to the whole of the land occupied by him, on the footing that he occupies the whole acreage of about 536 acres for purposes of husbandry, that is, as a farmer, whereas with regard to about 229 acres of these lands, called throughout in the case the arable lands, he has been assessed under r. 8. The remainder, about 307 acres, was made up of 40 arable acres under hops, 82 acres of mowing grass, 178 acres of grazing and seven acres of osiers. On these lands the appellant also kept livestock, namely, 16 horses, 90 cattle, 232 sheep, 1012 pigs and 8045 poultry and was assessed on them under the general rule of Sch. B. On the 229 acres the appellant grew various crops or produce. Of these wheat occupied 16 acres, grown partly to obtain the subsidy payable under the Wheat Act, partly to provide straw litter for the pigs. Mangolds (three acres), parsnips (six acres) and lucerne (half an acre) were grown to provide feed for the stock and horses. As these were not grown for sale they were, on that ground, in addition to the fact that their growing was an ordinary farming operation, outside r. 8, because the produce was not for sale. The commissioners held, however, that they were assessable under r. 8 on the ground that the farming operations were ancillary to what they described as "the market garden "operations," carried on on the remainder of the 229 acres. These, apart from 11½ acres of fallow, were used for growing, as set out in the case, sixteen different kinds of crops or produce, potatoes (seven acres), peas (26½ acres), beans (18½ acres), brussels sprouts (44½ acres), savoys (four acres), cauliflowers (18½ acres), leeks (three and a half acres), carrots (four acres), asparagus (two acres), plants (five acres), rhubarb (one acre), plums (17 acres), blackcurrants (one and half acres), strawberries (32 acres), raspberries (five acres) and loganberries (two acres).

The conclusions of the commissioners were that the whole of the 229 acres were occupied as " gardens for the sale of the " produce " and assessable under r. 8, and that the remainder of the land occupied by the appellant was devoted to farming operations assessable under the ordinary rules applicable to Sch. B. Lawrence J. held that the acres under wheat, parsnips, mangolds and lucerne were, on the face of the case, outside r. 8, but as to the remainder he decided that the decision of the commissioners should be upheld. His own view was that the finding in the special case that the whole acreage was worked as a single mixed farm was inconsistent with the decision to uphold an assessment on one part as gardens and on another as farm lands, because the land to be assessable as gardens must be distinct and separable from the farm. He thought, however, that there was some evidence to support the commissioners' finding on the authority of *David Lowe & Sons, Ld.* v. *Inland Revenue Commissioners* (1), where it was held by the Court of Session that the commissioners could apportion the assessment even where lands were held and worked as one unit. In the Court of Appeal by a majority, Scott L.J. dissenting, the decision of Lawrence J. was upheld, except that the court restored the finding of the commissioners as regards the lands which the commissioners found were ancillary to the gardens. Clauson and Goddard L.JJ., who formed the majority of the court, do indeed discuss to some extent the legal effect of r. 8, but in the main, as I read their judgments, they treat the question as one of " fact and degree " on which the finding of the commissioners is final, if, as they thought, there was some evidence to support it. Scott L.J., in an admirable and exhaustive judgment, with which in substance I agree, held that, on the findings of the commissioners and on the true construction of r. 8, their conclusions could not be supported, and that the appellant should be assessed as to the whole of the lands under the ordinary rules of Sch. B as being a single mixed farm.

The justification for stating a decision in the form of a special case for the opinion of the court is that it raises questions

(1) 21 Tax Cas. 597.

of law by which the correctness of the conclusions are to be decided. I think that such questions are involved in the present case. It has been strenuously contended as a main argument on behalf of the Crown that the questions here to be discussed are questions of "fact and degree." But, in my opinion, the true effect of the facts found cannot be ascertained until the true construction of r. 8 has been examined and its true application to the facts ascertained. There are, in addition to incidental questions, two main questions of law, namely, what is the meaning of "gardens "for the sale of the produce" and how is that meaning to be applied to an acreage which is worked as a single mixed farm in one unit. This latter point is that on which Lawrence J. would have, if he had felt free to do so, decided for the appellant, on the footing, as I follow it, that, according to the findings in the case, the whole area of 536 acres is not capable of being split or divided into two separate undertakings, one gardens, the other a farm, but that there is one single agricultural undertaking, and the parts which might otherwise be regarded as gardens are nothing more than parts of a single farming unit.

What, however, is the test by which it may be ascertained what are "gardens" within r. 8 as contrasted with a farm generally? It cannot be merely that the land is managed for the sale of the produce, that is, to make profits. All that a husbandman grows is for sale, subject, of course, to deducting such produce as is grown for use in connection with other parts of the undertaking (as, for example, in this case the parsnips and lucerne) or for the use of himself and his family. The farmer is a trader so far as he sells, though, apart from election under r. 5, he is assessed under Sch. B. The specific reference to sale as the object of growing the produce is to distinguish "gardens" within r. 8 from a private, non-commercial garden, ranging from the cottage garden to the garden of a great mansion, in which the fruit or flowers or vegetables are grown for home consumption or for the pleasure or the pride or the benevolence of the occupier. To distinguish gardening operations in this connection from other agricultural

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operations to raise produce from the land, there must be some other criterion. Scott L.J., in his judgment, has thrown light on this question by tracing back r. 8 to its first appearance in s. 75 of the Income Tax Act, 1806 (43 Geo. 3, c. 65), and then, when that Act lapsed, to its re-enactment in 1842. I disregard the special treatment of hoplands. "Nurseries," then as now, were coupled with "gardens." Scott L.J. quotes from an interesting work, Middleton's "Agricultural Survey of Middlesex," published in 1798. This shows the circumstances which in 1806 obviously were in the mind of the legislature. Middleton distinguished kitchen gardeners (obviously what we should call market gardeners) from farming gardeners. The former occupied smaller holdings, intensively cultivated "by the spade," engaged in supplying London from the outlying villages with fruit and vegetables. The latter had larger tracts of land, worked their soil principally by the plough, and were more distant from London. My noble and learned friend, Lord Maugham, has supplemented this information by referring to a report issued by the Ministry of Agriculture of the agricultural output of England and Wales in 1925. In table 4, on p. 128, the report gives the average annual production of the principal farm crops and includes, along with wheat, barley and oats, beans, peas, potatoes, turnips and swedes. Tables 7 and 8 give the enormous quantities of vegetables and fruit produced in that year in England and Wales, for instance cabbage for human consumption 410,000 tons, strawberries 705,000 cwt. This report shows clearly the enormous scale on which vegetables and fruit are produced. It seems to me to indicate a departure from the intensive or horticultural method prevalent according to Middleton in the smaller holdings about the end of the eighteenth century and an adoption of the methods of cultivation found in the case to have been adopted by the appellant, that is, ordinary agricultural methods (finding O) which the appellant used. The growth of the population, now mainly urban, and the great facilities for transmission must tend to the use, even in lands occupied as gardens within r. 8, of agricultural methods.

I, therefore, do not think that the use of such methods as contrasted with horticultural methods in the stricter sense can serve as a general criterion to distinguish gardening within r. 8 from farming, although that factor may be taken into account in considering whether particular lands are garden lands as contrasted with farm lands. The nature of the produce raised is no doubt also an important factor, but there again the line cannot be drawn with precision. Garden produce as meant by r. 8 has been described as what is sold in greengrocers' shops. But modern methods and demands have in many cases led to specialized production on a large scale. Potatoes are clearly an ordinary and important part of a greengrocer's stock, but it seems to me impossible to treat a case of cultivation like that illustrated in *Back* v. *Daniel* (1) as gardening in contradistinction from farming. There a large area, about 187 acres, was devoted to potato growing for sale. The question in the case was who was occupier, but throughout, as a matter of course, the operation is referred to as farming or husbandry and the assessment was under the ordinary rules of Sch. B. This view seems to me to be right. The same must be true, I think, of the raising, on a large scale, of crops of a particular produce such as cabbages. It does not follow that because certain produce is grown in gardens any land on which it is grown is necessarily a garden. The word " gardens " is not used in r. 8 in a technical sense. It is an ordinary word, to be understood as in ordinary popular usage. But, whatever else may be included in the word " gardens " in the rule, I think that it cannot be wholly divorced from its root idea of a substantially homogeneous area, substantially devoted to the growth of fruits, flowers and vegetables. The dictionary definitions of " garden " include the idea of its being an enclosed space. Thus, for instance, in the Oxford English Dictionary, " garden " is defined as : " An enclosed piece of ground devoted to the "cultivation of flowers, fruit and vegetables ; often preceded "by some defining word as flower, fruit, kitchen, market, "strawberry garden, etc." I do not say that in modern times gardening operations falling within r. 8 may not be carried on in open fields. But the essential characteristic of the statutory " garden " and the idea material to this case is that it should be within reasonable limits a defined unit of cultivation in relation to space. That is not inconsistent with the inclusion in the unit of some lands used at some particular time for other purposes. This is necessary for rotation of crops. But it must be possible to predicate a substantial and relatively permanent unity of character and purpose. This was so in *Monro and Cobley* v. *Bailey* (1), where this House upheld an assessment of 200 acres as a garden within r. 8, on 60 acres of which bulbs were grown. But it was necessary to have the remaining 140 acres in order to carry on the bulb growing, partly because of the operations necessary in shifting the bulbs from one area to another and partly for purposes of rotation. Bulbs are clearly a garden crop and the whole area was necessary to enable 60 acres of bulbs to be grown even though the remaining acreage was at times used for other crops. That may be described as an easy case, but it is no authority to govern this case. Indeed, it is in sharp contrast and illustrates the absence from this case of the factors necessary to constitute a garden. There was there a defined unit of occupation as a garden. Here there is no defined unit of occupation as a garden. On the contrary, the only defined unit of occupation is, according to the commissioners' finding, a mixed farm. The main area was called Springhill, which covered 508 acres. Within that area the great bulk of the mixed farming operations were carried on. The accuracy of the statement made by Scott L.J. in his judgment was accepted in argument in this House. He said: " There is nothing in their [the commissioners'] "findings of fact to indicate that the fields they added "together [to constitute the 229 acres which they held to "be gardens] were not scattered over the whole holding "so as to be interspersed with mowing grass or pasture fields; "and indeed it was common ground, as we were informed, "that the arable fields were so in fact interspersed." In my opinion, this state of things is inconsistent with the conception of "gardens." "Gardens" within the meaning of r. 8 cannot be notionally constituted by picking out from the total area about sixteen scattered fields, used in the year of assessment for producing fruit and vegetables. It would logically be just as easy to say that, if there were in the middle of the farm lands in a large farm, a single field of cabbages, that single field was a garden within r. 8. I do not doubt that in a large holding there might be two distinct portions spatially severable, one devoted to farming operations, the other to the growing of fruit and vegetables. Each of these separate areas might properly be separately assessed, the one area as a farm under the ordinary rules of Sch. B, the other as gardens under r. 8. But that is a different matter. There is in that case no intermingling of garden and farm.

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(1) [1925] 1 K. B. 526.

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(1) 102 L. J. (K. B.) 471; 17 Tax Cas. 607.

The commissioners' conclusion would also involve serious administrative difficulties. There is here no continuity or fixity in the user of any particular field. The particular field used in the year of assessment for growing fruit and vegetables may have been, owing to the ordinary system of rotation of crops, used in the preceding year for ordinary farm purposes. Rule 8 requires the application to the lands coming within it of the rules of Sch. D which make the tax payable on the basis of the previous year's income. But it would be impossible, in the case supposed, to ascertain the gardening profits of the particular field, or, indeed, of the aggregate of the particular fields in accordance with the proper methods of computation. This was even more obvious before the profits of the preceding year were substituted for the average profits of the three preceding years. It is no answer that in each year the business might be treated as a new business begun in that year. That would not be in accordance with the fact, and would necessitate complex book-keeping and accounting such as could not be exacted from the agricultural community. The difficulty was solved in *Monro and Cobley* v. *Bailey* (1) by treating the whole area as a single unit of cultivation for gardening purposes.

(1) 102 L. J. (K. B.) 471; 17 Tax Cas. 607.

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But the facts there justified the finding that the whole unit was a garden. Here, for reasons which I have explained, no such finding is justifiable. It is not legitimate to constitute a notional garden by claiming to aggregate the disjecta membra, the scattered and islanded fields, in which fruit or vegetables are grown.

But, apart from all these difficulties, the matter is concluded, as I think, by the finding of the commissioners that "the whole acreage occupied by the appellant was worked "as a single mixed farm in one unit. The appellant employed "ordinary farm labourers who were not highly skilled." The case adds that the workers worked indiscriminately on the whole farm, whether on the sheep, pigs, cattle and poultry or on the pasture or the arable land, and the methods of cultivation were the ordinary accepted agricultural methods. In my opinion, these findings mean that there was one unit of cultivation, and that it was a farm. They exclude the idea that the farm was partly "gardens," or that there was any division into component or separate parts. I picture the farmer facing the problem what would be the best use to make of his farm of 500 odd acres from year to year, deciding what different kinds of produce or stock would pay best, what rotation of crops requires, and deciding how best to apportion his land among the different purposes. Another year he would have the same problem and presumably settle it in a different way. Lawrence J. was of opinion, as I have already observed, that the first finding was inconsistent with a decision to uphold an assessment on one part as gardens and on another part as farm lands. I agree with him, and I also agree with him in taking as an essential criterion of "gardens" in r. 8, that the lands to be characterized as gardens must be distinct and separate from the farm. This was also the view of Scott L.J.

Lawrence J. was diverted from his own view because he felt bound to follow the Scots decision, *David Lowe & Sons, Ld.* v. *Inland Revenue Commissioners* (1). But in that case the taxpayer admitted the possibility of picking out individual separate fields and aggregating them to form notional

(1) 21 Tax Cas. 597.

"gardens." I think that the case cannot be supported in principle. The other cases cited do not appear to me to help, and I do not discuss them.

I ought to add, though it is not material in view of my general conclusion, that I should agree with Lawrence J. with reference to that part of the arable lands which the commissioners held to be ancillary to the gardens. Lawrence J. shrewdly observes that he cannot see how these lands were ancillary to the gardens any more than the other lands used for feeding stock, which, indeed, was exactly what these lands were used for. I ought also to add that the cases of woodlands and hoplands stand on a different footing, as also does glasshouse cultivation.

In my opinion, the appeal should be allowed.

LORD PORTER. My Lords, the short question in this appeal is whether a portion of the appellant's land can rightfully be severed from the rest and classed as land occupied as "gardens for the sale of the produce." If it can, under r. 8 of Sch. B to the Income Tax Act, 1918, its profits are to be assessed and charged under that schedule as profits arising from the occupation of land, but they are to be estimated according to the provisions and rules applicable to Sch. D, i.e., not on the annual value of the land, but on the profits derived from it. If it cannot, then the charge is normally made in respect of the occupation of the land for every twenty shillings of the assessable value, i.e., in the case of land used for husbandry, on the annual value of the land without regard to the profits made, save in so far as they affect its assessable value.

The reason for the differentiation is agreed by both parties to be due to the much greater amount of profit expected to be earned proportionate to the acreage occupied in the case of lands occupied as gardens compared with that expected when they are used for husbandry or other purposes. The distinction goes back to the period at which income tax was imposed in 1806, when not dissimilar language was used, and to the renewal of the tax in 1842, when the language was almost identical with that now in use.

Under r. 8 hop gardens are now, after some changes in the law, left to be dealt with under the ordinary provisions of Sch. B, and under rr. 5 and 7 lands occupied for the purpose of husbandry and woodlands managed on a commercial basis and with a view to the realization of profit may at the option of the occupier be assessed under Sch. D instead of under Sch. B.

In the present case the lands the subject-matter of the dispute form part only of the appellant's holding. The Crown maintains that they are properly severable from the rest and chargeable under r. 8 as lands occupied as "gardens for the "sale of the produce." The appellant contends that, having regard to the facts of the case, they cannot be disassociated from the rest of the land, and in any case are not such gardens. The commissioners, to whom the question was referred, found that the lands could be divided, and that the whole of the arable land occupied by the appellant (apart from that occupied for the growth of hops) was occupied as "gardens "for the sale of the produce," but they stated a case for the opinion of the High Court. Lawrence J., before whom the case was argued, upheld the finding of the commissioners (subject to a slight modification), but, as I gather, with some reluctance. If he had not felt himself bound by authority, he would have decided that no division was permissible, and, although he thought that there was some evidence on which the finding that the arable portion was a garden could be supported, and, therefore, did not feel justified in differing from the commissioners, he would, if left to himself, have found the other way. In the Court of Appeal, Scott L.J. disagreed on both points, but Clauson and Goddard L.JJ. thought both were questions of fact and degree, and inasmuch as, in their view, there was some evidence on which the commissioners could base their findings, they affirmed the decision.

I did not understand the appellant to seek to establish that in a proper case a holding could not be divided into two portions, one of which was occupied as "gardens" (for brevity's sake I omit the words "for the sale of the produce")

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and the other not so occupied. Nor do I think he would be right if he did. Provided it is clearly shown that one part of the land is so occupied and there is a definite separation in the method of working, I see no reason why the two portions should not be separately assessed, and, speaking for myself, I think this conclusion might be arrived at though the portions separately worked were not divided into two continuous parts, but were made up of broken portions of the area. In the latter case, however, it would, I think, require very clear evidence that the working and method of working of the part classified as a garden differed from that of the other portion of the lands.

The appellant did, I think, contend that in no case was it permissible to deduce the conclusion that the land was occupied as a garden solely from the type of crop grown, that is, from the fact that it was what the representatives of the Crown described as garden produce. Again speaking for myself, I think that, if substantially the whole of an undivided holding contained little save such crops as are as a rule grown only in gardens, and, in particular, if a mixed crop consisting substantially of garden produce was shown to be cultivated on the land, there would be evidence on which the commissioners could find that the land was occupied as " gardens." But the fact that part only of the land was so used would not entitle them to split up that portion and call it " gardens," nor even, if no splitting were required, would it be legitimate to rely on the fact that the produce was such as might be grown on farms or gardens. An inference cannot be drawn from the growth of a crop of doubtful classification.

If I were asked to state the most material matters to be looked at in determining whether a particular portion of land was occupied as a garden or no, I should lay stress on (*a*) the unit to be considered, i.e., was the whole land worked by the same methods and the same staff, or was there some clear distinction in its treatment; (*b*) the method of cultivation, i.e., was it intensive and under skilled labour or not; (*c*) what crops were grown there; and, I think (though its importance is slight), (*d*) the size of the unit. That the cultivation was effected by mechanical means would not, I think, provided it were proved to be intensive, make it impossible to hold that the land was occupied as " gardens." Methods of cultivation change, and what at one time can only be accomplished by the spade may at another be brought about by some mechanical substitute, but, even so, the large-scale operations of a farm are still likely to be distinguishable from the more individual cultivation of a garden crop.

Some continuity of treatment is also, I think, predicated. No doubt, a garden must be begun at some time, and the fact that it has only just been brought into being will not prevent it from being a garden, but income tax under or in accordance with the principles of Sch. D is chargeable on the profits of the year to come, now estimated by the profits of the year before, and formerly on the average profits of the three previous years. It is inconsistent with such a provision that land should in one year be regarded as occupied for husbandry and the next as a garden merely because the crops vary from year to year. No doubt if land as a whole is occupied as a garden it is immaterial that it is found advisable in the ordinary rotation of crops to grow farm produce from time to time on a portion, just as, if land as a whole is occupied for husbandry, it, or a portion of it, does not become a garden because garden produce is cultivated from time to time on some part of it. It is the cultivation as a whole that is to be looked at, not its temporary variations.

These principles are, I think, consistent with the decided cases. In both *Munro and Cobley* v. *Bailey* (1) and in *Dennis* v. *Hick* (2), the whole of the land occupied was found to be occupied as " gardens " because substantially that was its use, though in the earlier case a much larger acreage was cultivated in order that the room necessary for the replanting of bulbs might be available. In the latter the portion not used for gardening purposes was found to be merely ancillary to the part so used, by which I understand it to be meant that the additional portion was worked with the garden as one unit because it was convenient to do so. In neither case was the finding dependent on the crop alone. In the former case the crop was bulbs (which is not a usual crop in ordinary husbandry) sold for replanting. The profit was made largely from them and their flowers. In addition, the cost of labour was much in excess of that employed on ordinary farming operations. In the latter the cost of labour per acre far exceeded that of a farm. Much heavier manuring took place and much of the work on the crop, both when growing and after picking, was done by hand.

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(1) 102 L. J. (K. B.) 471; 17 Tax Cas. 607.

(2) 19 Tax Cas. 219.

David Lowe & Sons, Ld. v. *Inland Revenue Commissioners* (1) was the only case quoted to us of the splitting up of land in the same occupation, and was the case which the learned judge thought himself obliged to follow in deciding in favour of the Crown. I refrain from expressing an opinion whether or not the commissioners were in that case rightly held to have had such material before them as entitled them to decide that the divided portion was a garden. The decision seems in part to have turned on an admission of counsel, and, as appears from the opinion of Lord Carmont, the question of splitting was not argued. The case, therefore, affords no authority on that matter.

It only remains to apply these considerations to the present case. Prima facie the unit was the whole farm. Findings (C), (D) and (O) of the case are as follows: (C) The whole acreage occupied by the appellant was worked as a single farm in one unit. The appellant employed ordinary farm labourers who were not highly skilled. (D) The appellant used very up-to-date appliances and practised mechanized farming over the whole farm. The minimum amount of hand labour was used in producing crops upon the arable land, much of it being machine planted and machine hoed. (O) The methods of cultivation were the ordinary accepted agricultural methods; and those findings show that the farm was worked as one unit. That the stock keeping was no merely ancillary activity is shown by the value and amount of the stock and the magnitude of the sums derived from its sale. Each activity was an important one and each assisted the other. That the labour

(1) 21 Tax Cas. 597.

was not highly skilled and that ordinary agricultural methods were used might, I think, support an argument that the appellant was a farmer, but those facts afford no reason for dividing up his holding.

Except the nature of the crop and the fact that part was arable and part pasture, the only difference between the two portions appears to be that a heavier expenditure was incurred for labour on the arable than on the other, and that, to my mind, is not enough, even though I accept as accurate the statement in (K) that the cost of labour over the whole farm was 12*l.* per acre and over the land on which fruit and vegetables were grown, 18*l.* per acre, a statement which appears to be inconsistent with the allegation in (J), that the wages for the year amounted to 9684*l.* 17*s.* 10*d.*, a figure which makes wages over the whole area amount to not 12*l.* but 17*l.* 12*s.* per acre. Even if splitting was justified, I should have difficulty in holding that the divided portion was occupied as a garden. The only evidence is derived from the crop, the fact that part was sold through an agent, and that supplies were sometimes obtained from other growers. Many of the crops are such as might be grown either on a farm or in a garden.

If there had been a finding that a substantial portion of the crop was such as in the district was grown in gardens only and not on farms the conclusion that the arable land was occupied as " gardens " might be justified, at any rate, on an undivided farm, but to my mind it is not enough for facts to be set out which do not of themselves (apart from circumstances which may possibly exist and be known to the commissioners to exist) point to a conclusion either way, and then to have a finding of fact from those inconclusive matters. There may, it is true, be other facts justifying the conclusion, but your Lordships, like any other tribunal to whom the case is referred, are bound to consider only the facts found.

It seems to be not unusual, if my examination of the cases is accurate, for commissioners, after stating the facts, to say that they come to a certain conclusion, and, accordingly, find such and such a thing as a fact. I do not think this is justifiable. The final result is not a fact. It is an inference from facts

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previously set out. I should prefer the commonplace of the legal arbitrator: "So far as it is a question of fact, I find as a "fact; and so far as it is a question of law, I hold . . . ." But this is a matter of form rather than of substance.

In the present case my view is that the splitting up of the holding for tax purpose was not justified and there was no evidence on which the commissioners could find that the portion which they so notionally divided from the rest was occupied as "gardens for the sale of the produce."

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Ellis & Fairbairn.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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July 30.

RICKARDS . . . . APPELLANT;
AND
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ROBERTSON . . . . APPELLANT;
AND
MIDDOWS, LIMITED . . . . RESPONDENTS.

KAHN . . . . APPELLANT;
AND
W. H. HOWARD BROTHERS AND COMPANY, LIMITED . . . . RESPONDENTS.

Insurance (Marine)—War risks—Policy "warranted free of any claim "based upon loss of, or frustration of, the insured voyage or adventure "caused by . . . . restraints . . . . of . . . . princes" — British

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* *Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD THANKERTON, LORD WRIGHT and LORD PORTER.

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cargo in German ships—Outbreak of war—Deviation to neutral port by order of German government—Subsequent departure for Germany—Ship scuttled with cargo—Arrival of ship and cargo in Germany—Constructive total loss—Liability of underwriters—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 45 ; *s.* 49, *sub-s.* 1 (*a*), (*b*), (*d*) ; *s.* 60, *sub-s.* 2 (i.) (*a*) ; *Sch. I.*, *r.* 10.

By Lloyd's policies of insurance against marine and war risks, cargoes belonging to the assured, who were British subjects, and shipped in three German vessels, the M., the W., and the H., for various destinations in August, 1939, were insured by underwriters against " enemies . . . . surprisals, takings at sea, arrests, " restraints and detainments of all kings, princes and people," and, by incorporation of the Institute War Clauses, against the risks, excluded from the standard form of English marine policy by an f.c. and s. clause, and " the consequences of hostilities or " warlike operations . . . ." Each policy provided : " Warranted " free of any claim based upon loss of, or frustration of, the " insured voyage or adventure caused by arrests restraints or " detainments of kings princes peoples . . . ." Each policy, by incorporation of clauses and bill of lading liberties, gave the ship certain rights as to deviation or changing her voyage.

The voyages were begun before the outbreak of war between Great Britain and France and Germany on September 3, 1939, but on August 24, the M., on September 1, the W., and on September 6, the H., put in at neutral ports in obedience to orders by the German government that the masters should so take refuge and, if possible, return to Germany with their cargoes, or, as a last resort, scuttle their vessels. The M. and the H. left their ports of refuge some weeks after the outbreak of war in an attempt to reach Germany, but were eventually scuttled in the presence of Allied warships. The W. succeeded in reaching Germany in March, 1940.

No notices of abandonment were given by the assured to the underwriters, but in actions brought by the assured for the loss of the cargoes the underwriters agreed to waive the absence of notice and the cases were argued on the assumption that due notice had been given at the proper time :—

Held, (1.) that when the masters of the ships determined to obey the instructions of the German government and to return to Germany and acted on that determination, thus holding the insured goods as the servants and agents of the German government instead of as the bailees of the assured (which was, at latest, when each ship left her port of refuge), the assured were deprived of the possession of their goods by an executive act of the German government within r. 10 of Sch. I. to the Marine Insurance Act, 1906, performed through the masters, and that this act was a restraint of princes ; (2.) that it was then unlikely that the assured could recover their goods, and that, therefore, there was a constructive total loss of the goods within s. 60, sub-s. 2 (i.) (*a*), of the Act, which was converted into an actual total loss when the M. and the H. were scuttled and the W.

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reached Germany; (3.) that the policies were not avoided by the deviations from the contractual voyages to the neutral ports, because those deviations were excused as having been "caused by circumstances beyond the control of the master and "his employer" within s. 49, sub-s. 1 (*b*), of the Act, or "reasonably necessary for the safety of the ship or subject-matter "insured" within s. 49, sub-s. 1 (*d*), nor were the policies avoided by the changes of the contractual voyages because those changes were not voluntary, and, consequently, were not within s. 45 of the Act; (4.) that the frustration clause in the policies did not bar the claim of the assured because the subject-matter of a marine insurance on goods is two-fold, the goods and the adventure, whereas the clause was expressly limited to loss of, or frustration of the insured voyage or adventure and therefore could not be read to exclude a claim for loss of the goods. That clause only applies where no claim could be put forward for the loss of insured goods apart from the loss of the adventure, whereas the claims of the assured were for the loss of the goods and not for that of the adventures. The assured, therefore, were entitled to recover.

British and Foreign Marine Insurance Co., Ld. v. *Samuel Sanday & Co.* [1916] 1 A. C. 650, distinguished on the last point.

Per Lord Wright. There may in law be a restraint of "kings, "princes and people" within the meaning of a marine policy although the physical force of the State concerned is not immediately present. It is enough if there is an order of that State addressed to its subject, acting with compelling force on him, exacting his obedience, and requiring the doing of an act which effectively restrains the goods covered by the policy.

Per Lord Wright. The common law rule that the date which is to be taken in ascertaining whether or not there has been a constructive total loss of the subject-matter of a marine insurance and whether or not a notice of abandonment given by the assured was justified, is that of the issue of the writ in an action by the assured against the insurers on the policy has not been altered by the Marine Insurance Act, 1906.

Per Lord Porter. Underwriters do not succeed in proving a loss within the exception in the frustration clause merely by showing that the adventure has been lost. A total loss of goods must always have that result. They must go further and show that the claim of the assured follows and is based on the loss of the adventure, not merely that the loss of the adventure is a consequence of the loss of the goods, even though that loss be due to combatant seizure. In the present case it is true that the adventure was put an end to by the loss of the goods, but the goods were not lost by reason of the loss of the adventure.

Decision of the Court of Appeal [1941] 1 K. B. 225 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Hilbery J.

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(1) [1941] 1 K. B. 225.

The respondents were at all material times the owners of goods shipped in the steamships *Minden*, *Wangoni*, and *Halle* respectively, each of these ships being German owned. The goods shipped were insured under Lloyd's marine and war risks policies by the appellants and other underwriters for the voyages specified against "perils of the seas, men-of-war, "fire, enemies, pirates, rovers, thieves, jettisons, letters of "mart and countermart, surprisals, takings at sea, arrests, "restraints and detainments of all kings, princes and people, "of what nation, condition or quality soever, barratry of the "masters and mariners, and of all other perils, losses and "misfortunes that have or shall come to the hurt, detriment or "damage of the said goods and merchandises and ship, etc., or "any part thereof;" and also, by incorporation of the Institute War Clauses against (cl. 1) "(*a*) the risks excluded from the "standard form of English marine policy by the clause: "' Warranted free of capture seizure arrest restraint or detain-"' ment, and the consequences thereof or of any attempt thereat; "' also from the consequences of hostilities or warlike operations, "' whether there be a declaration of war or not, civil war, "' revolution rebellion insurrection or civil strife arising "' therefrom, or piracy; (*b*) loss of or damage to the property "' hereby insured caused by (1.) hostilities warlike operations "' civil war revolution rebellion insurrection or civil strife "' arising therefrom; (2.) mines torpedoes bombs or other "' engines of war.'"

Clause 10 of the Clauses for Shipment from South America, which were also attached to the policy covering the cargo shipped in the *Minden*, provided: "Held covered, at a premium "to be arranged, in case of deviation or change of voyage . . . . "In the event of the exercise of any liberty granted to the "shipowner or charterer under the contract of affreightment "whereby such contract is terminated at a port or place other "than the destination named therein, the goods are held "covered in terms of these clauses at a premium to be arranged "until sold and delivered at such port or place or notice be "given to underwriters to terminate the policy whichever first "occurs; or, if the goods be forwarded to the destination "named herein or to any other destination, until arrival at "destination." By cl. 12: "Including all liberties as per "contract of affreightment . . . ." By cl. 13: "With leave to "call and stay at all ports and places, in any rotation, in or "out of the customary route for all purposes whether necessary "or otherwise . . . ." By r. 2 of the bill of lading rules: "Ship to be at liberty to call at any ports in or out of the "customary or advertised route in any rotation and for any "purpose . . . ." By a "war clause" attached to the bill of lading: "When and so long as a state of war exists and/or "so long as any control over the use or movements of the "vessel is exercised by any government . . . . the carrier and/or "his agents and/or the master may (if in his or their uncon-"trolled discretion he or they think it advisable) at any time "before or after the commencement of the voyage alter or "vary or depart from the proposed or advertised or agreed "or customary route, and/or delay or detain the vessel at or "off any port or place and/or tranship the cargo at any port "or ports, place or places without being liable for any loss or "damage whatsoever directly or indirectly sustained by the "owner of the goods. The ship in addition to any liberties "expressed or implied herein, shall have the liberty to comply "with any orders or directions as to . . . . routes, ports of call, "stoppages . . . . discharge or destination, or otherwise how-"soever given by any government . . . . and if by reason of "and in compliance with, any such orders or directions, "anything is done or not done, the same shall not be deemed "a deviation . . . ."

The policy covering the goods shipped in the *Wangoni* further provided by incorporation of the Institute F.P.A. Clauses, for insurance "against all and every risk of loss and/or damage "from any cause whatsoever" and a clause attached to the bill of lading provided: "If one of the following incidents or one "of the following measures occurs or threatens to occur, that "is to say, war between any peoples; civil war; prohibitions, "restrictions or control by any government of traffic, or by "any other means, with any country from which or to "which the ship normally sails; control or disposal by any "government or authority of the use or movement of the ship ". . . . the shipowner (or his representative) is entitled, if he "considers that the ship, her master, officers, crew, passengers "or cargo are subject, either wholly or in part, as a result of "the incidents or measures referred to above, to loss, damage, "contravention or detention, or to suffer delay, to alter the "journey either before or after its commencement, or to vary "the anticipated, agreed or usual voyage, or to detain the "ship, or to delay the voyage."

The policy covering the goods shipped in the *Halle* further provided, by incorporation of the Timber Trade Federation Insurance Clauses, 1938 (cl. 2), for insurance of the cargo against "all risks . . . . whilst on board the ocean-going vessel "until discharged at port of destination . . . . and all liberties "and liabilities as per bill of lading or contract of affreightment." The bill of lading gave the *Halle* "liberty to call "at any ports in any order" and a war clause attached provided: "The carrier, in addition to any liberties expressed or "implied herein, shall, in the event of the imminence or "existence of war, hostilities or warlike operations between "any nations . . . . and measures taken by any governments "in consequence of or connected with any of the above matters, "have the rights and liberties as set out in the war risk clause "incorporated in this bill of lading. Anything done or not "done by reason of or in compliance with these clauses is "within the contract voyage . . . ." [No other war risk clause was incorporated in the bill of lading.] The policies contained sue and labour clauses, and they then provided: "Warranted free of any claim based upon loss of, or frustration "of, the insured voyage or adventure caused by arrests restraints "or detainments of kings princes peoples usurpers or persons "attempting to usurp power."

The policies incorporated the Institute Strike and War Clauses, which provided: "Held covered at a premium to be "arranged in case of deviation or change of voyage or other "variation of the adventure by reason of the exercise of any "liberty granted to the shipowner or charterer under the "contract of affreightment . . . ."

All the assured and underwriters were British subjects.

In the first case (hereinafter called "the *Minden*") the insured voyage was from a South American port to Hong Kong and/or Shanghai. In the second case (hereinafter called "the *Wangoni*") the insured voyage was from Bremen to Cape Town. In the third case (hereinafter called "the *Halle*") the insured voyage was from Bunbury, Australia, to London via the Cape of Good Hope.

The *Minden* sailed from Buenos Aires with Durban as her first port of call with the insured goods on board shipped under bill of lading dated August 16, 1939. On a normal voyage she would have reached Durban on or about September 15, 1939. The course of the vessel was due east, but on August 24 she arrived at Santos, Brazil, sailed again the same day, and arrived at Rio on August 25. She stayed there until September 6, three days after the outbreak of war, and then sailed, evidently to return to Germany. On September 29, in the presence of a British warship, she was scuttled by those on board off the Faroe Islands, and was lost with all her cargo, including the insured goods. The *Wangoni* sailed from Bremen bound for South Africa with the insured goods on board under bill of lading dated August 12, 1939. On a normal voyage she would have reached Cape Town on or about September 12. In fact, she arrived at Las Palmas on August 29, but the same day she sailed back from there to Vigo, Spain, arriving there on September 1. She remained at Vigo until February 10, 1940, when she sailed for Hamburg, where she arrived on March 5. The *Halle* sailed from Bunbury with the insured goods on board shipped under bills of lading dated July 27, 1939. She passed the Cape of Good Hope on August 18 and on a normal voyage would have arrived in London on or about September 16. In fact, she took refuge at Bissao, Portuguese Guinea, a neutral port, on September 6. She sailed from Bissao on October 13, and on October 16, in the presence of a French warship, she was scuttled by those on board her and was lost with all her cargo, including the insured goods.

It was agreed between the parties that on and after

September 3, 1939 (when war was declared between Great Britain and Germany) there was risk of capture whenever any one of the ships was outside the territorial waters of any neutral state; that, as from that date, there was an effective blockade of all German ports by the British and French naval forces, who were taking all possible steps to intercept, capture or destroy all German merchant vessels on the high seas; and that at all material times the German government, in furtherance of German war policy, had taken control of all German owned merchant shipping and had given orders to all such vessels and their masters to take refuge in neutral ports, and, if possible to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels.

In the cases of the *Minden* and the *Halle* the assured claimed under their respective policies as for a total loss of the insured goods through the scuttling of the ships, or, alternatively, as for a constructive total loss on the ground that after the beginning of the voyages the captains of the ships, acting on the orders of the German government, proceeded to neutral ports and thence towards Germany with the intention of holding the cargo for and to the order of the German government or of not delivering it to or for the plaintiffs. In the case of the *Wangoni* the assured claimed as for a total loss of the goods on the ground that during the stay of the ship at Vigo it was impossible for them to obtain possession of the goods, or, alternatively, impossible for them to obtain possession of the same except on payment to the Rotterdam agents of the shipowners of the full freight and a percentage of the value of the goods for calling at a port of distress according to the German commercial code and the performance of other conditions, which, the assured alleged, in view of the prevailing state of war, it would have been illegal for them to pay or perform. Further, the assured said, after the ship had left Vigo it was impossible for them to obtain possession of the goods, or, alternatively, it was impossible for them to obtain possession of the goods except in Germany on the performance of the conditions mentioned which it would have been illegal for them to perform. Alternatively, they claimed as for a constructive total loss on the same grounds as the claims as for constructive total loss were made in the cases of the *Minden* and *Halle*.

The underwriters, by their defences, denied any total or constructive total loss of the insured goods, or any loss proximately caused by perils insured against, and they claimed that the voyages were abandoned and the risks under the policies thereby ended. Alternatively, they said that the policies were expressly warranted free of any claims based upon loss of, or frustration of, the insured voyages or adventures caused by arrests, restraints or detainments of kings, princes or peoples, and that the claims were based upon loss so caused.

By their counterclaims, the underwriters said that, if there was any loss by perils insured against and if the voyage was not frustrated or abandoned, or the insurance was not void or avoided for illegality, the ships deviated from, or, alternatively, changed the voyages insured, and by the express terms of the policies the goods were only held covered at an additional premium to be arranged, and no additional premiums had ever been tendered or paid, and they claimed declarations that they were entitled to reasonable additional premiums to be assessed.

The assured, by their reply, denied that the voyages had been abandoned, or that the risks were ended, or that there were changes of voyage or deviations. Alternatively, the abandonments, changes of voyage and deviations were due to circumstances beyond the control of the masters and owners of the ships, or were reasonably necessary for the safety of the ships or cargoes, or were occasioned by the barratrous conduct of the masters or crews. Alternatively, the captains so acted on the orders of the German government. Any abandonments, deviations or changes of voyage were, therefore, justified. They admitted that no additional premiums in respect of any deviations or changes of voyage were ever tendered or paid, but they denied that any were due.

Although the assured had not given the underwriters any notices of abandonment, the underwriters agreed to waive their absence and each case was argued as if due notice had been given at the proper time.

Hilbery J. held in each case that when the ship left the neutral port there was a loss of the insured goods by restraints of princes and people, and, possibly, also a loss under the peril described in the policy as "enemies," but the loss was brought about by loss of, or frustration of, the insured voyage or adventure caused by restraints of princes or peoples within the frustration clause. Moreover, the loss did not occur while the policy was in operation, the adventure having been frustrated and the insured voyage having been totally abandoned at the neutral port and the "held covered" clause incorporated in the policy not being capable of being construed as covering such an adventure as the master undertook when he weighed anchor at the neutral port and set out for Germany. The plaintiffs could not, therefore, recover as for a constructive total loss. With regard to the claims as for actual total loss arising out of the scuttling of the *Minden* and the *Halle*, those ships, when trying to run the Allied blockade and reach Germany, were engaged in a warlike operation so that the loss of the insured goods was a consequence of warlike operations. In law, also, the ships were captured at the time of the scuttling. For the reasons given, however, the loss did not occur while the policy was in operation and the plaintiffs could not recover.

On appeal, the Court of Appeal held that the deviations of the ships from the contractual voyages to neutral ports, their departures from those ports in attempts to reach Germany, the scuttling of the *Minden* and the *Halle*, and the bringing of the *Wangoni* and her cargo to Germany, were the acts of the German government through their agents, the masters of the ships; that when the ships were diverted towards the ports of refuge the German government through the masters received actual possession of the cargoes and thereafter retained it, and that either when the masters determined to obey the orders of the German government or when, in pursuance of those orders, they left the neutral ports for Germany, the German government converted the cargoes to

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its own use, and there then resulted to the plaintiffs a constructive total loss of the cargoes caused by a peril or perils within the policies; that the frustration clause in the policies did not bar the plaintiffs' claims because that clause only applied where no claim could be put forward for the loss of insured goods apart from the loss of the adventure, and the plaintiffs' claims were for the loss of the goods and not for that of the adventures; that, on the construction of the policies and the clauses attached to them, the policies were still in force when the ships left the ports of refuge; and, therefore, that the plaintiffs were entitled to recover.

The underwriters appealed to this House.

A. T. Miller K.C. and *A. J. Hodgson* for the appellants. The respondents are not entitled to recover inasmuch as the policies of insurance had ceased to attach before there was either an actual or a constructive total loss; in other words, the insurance had run off before the loss occurred. In *Polurrian Steamship Co., Ld.* v. *Young* (1) a neutral ship carrying a cargo of coal and insured against the consequences of warlike operations was captured by a belligerent and detained for some weeks and then released. In an action to recover on the policy it was held that by the Marine Insurance Act, 1906, the test of "unlikelihood of recovery" had been substituted for "uncertainty of recovery," and that as the owners had not shown that there was more likelihood that they would not, than that they would, recover the ship, their claim failed. In that case Warrington L.J. said (2) that "the fair result of the evidence, in regard to the position of the "*Polurrian* on October 26, whether viewed apart from subsequent "events, as I think it should be, or by the light of those events, "was, in my judgment, one in which her ultimate release "from capture was a matter of uncertainty." That language applies exactly to the facts of this case. Restraint of princes necessarily puts an end to the adventure. The contracts thus became impossible of performance; indeed they became illegal. With regard to the claim for an actual total loss by

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(1) [1915] 1 K. B. 922. (2) Ibid. 934.

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scuttling, the answer is that before the happening of that event the policy had ceased to cover the goods. In *British and Foreign Marine Insurance Co., Ld.* v. *Samuel Sanday & Co.* (1) this House decided that the law with regard to frustration of the voyage by the detention of goods for an indefinite time by a peril insured against entitled the owner on giving notice of abandonment to recover as for a constructive total loss has not been altered by the Marine Insurance Act, 1906. In *Miller* v. *Law Accident Insurance Co.* (2) it was held by the Court of Appeal that the operation of the ordinary municipal law of a country affecting or preventing the delivery of insured goods at their port of destination is a "restraint of princes "or people" within the meaning of a Lloyd's policy of marine insurance, and that consequence followed notwithstanding that actual force was not used, the master of the vessel submitting to the orders of the local administration. In this case when the master departed from his course there was an abandonment of the insured voyage, and consequently the policy no longer attached.

Sir Robert Aske K.C. and *Cyril Miller* for the respondents were called upon only as to the *Wangoni*. We contend that from the time the captain decided to carry out the orders he received he no longer held the goods for the owners of the cargo; he held them for the German government. That government took control at all material times and issued its orders to the master. The vessel had been bound for the Cape and meant to go there until the master received orders from the German government to go elsewhere. That overt act is sufficient to enable the House to arrive at the conclusion of fact that the master was then acting for the German government and no longer for the owners.

The House took time for consideration.

1941. July 30. VISCOUNT SIMON L.C. My Lords, I have had the advantage of studying in print the opinions which are about to be delivered in these three appeals by my noble

(1) [1916] 1 A. C. 650.

(2) [1903] 1 K. B. 712.

and learned friends, Lord Wright and Lord Porter. Those opinions set out the essential facts in the three cases which have been selected by underwriters and cargo owners as providing typical illustrations, in different forms, of the problem before us. I forbear, therefore, to summarize the facts on my own account, and moreover, inasmuch as I entirely agree with my noble and learned friends in the conclusions at which they arrive and in the course of reasoning which has led them to their result, I shall content myself with a more summary statement of what I regard as the main principles governing the matter.

In each of the three cases the trial judge, Hilbery J., in a careful and detailed judgment, decided that the underwriters were, in the events which had happened, under no liability to the assured. The Court of Appeal (Scott, MacKinnon and Luxmoore L.JJ.) took a different view and entered judgment in each case against the underwriters. The underwriters now appeal to this House and the representative character of the three cases that have been selected to raise the issue is emphasized by the arrangement which has been made between the underwriters and the cargo owners that the former undertake to pay costs up to this House in any event. We have had the assistance of full and careful argument from counsel on both sides, and I believe that the House has reached the unanimous conclusion that the underwriters' appeals should be dismissed.

In each of the three cases the claim is by British owners of cargo against Lloyd's underwriters on voyage policies covering both war and marine risks on goods which were shipped in German steamers to places in the British Empire, and we are informed that the values of cargoes amounting to many millions of pounds may depend on the issue. In each case the German ship had entered on the performance of her contract of carriage with the British cargo owners before the outbreak of war and had not completely performed her contract before the war broke out. Each of these German vessels, in common with all other German-owned merchant shipping which was sailing the seas, was subject to German war policy, imposed by directions issuing from the German government, to the effect that, if war threatened between this country and Germany, or if war actually broke out, the ship must take refuge in a neutral port, and, if possible, return to Germany with her cargo, or, as a last resort, must scuttle herself rather than be captured. On and after September 3, 1939, there was risk of capture of each of these vessels when outside the territorial waters of any neutral state. The vessels, in each of the three selected cases, deviated from the accustomed and natural course in order to take refuge in other ports in accordance with the general directions which they had received from the German government. Ultimately, they abandoned the contractual voyage altogether and made an effort to get back to Germany. Two of them were in danger of being captured in the Allied blockade, and, accordingly, scuttled themselves. The third succeeded in getting through to Hamburg. For a more precise statement of dates and places I would refer to the opinions prepared by my noble and learned friends.

The cargo in each case, as I have said, was covered by a voyage policy covering both war and marine risks. The insured perils include "of the seas, men-of-war, fire, enemies ". . . . surprisals, takings at sea, arrests, restraints and detain-"ments of all kings, princes and people . . . . and of all other "perils, losses and misfortunes that have or shall come to the "hurt, detriment or damage of the said goods and merchandise." But there is added, in italics, what has been called in argument the "frustration clause" as follows: "Warranted free of any "claim based upon loss of, or frustration of, the insured voyage "or adventure caused by arrests restraints or detainments "of kings princes peoples usurpers or persons attempting to "usurp power."

Two questions arise: First, if the frustration clause was not contained in the policy at all, would the cargo owners be entitled to recover? In other words, did the loss of their goods occur at a time when they were still covered by the policy? Secondly, even if the cargo owners could make good their claim under the policy in the absence of the frustration clause, does the frustration clause operate so as to relieve the underwriters from their liability which would otherwise attach to them?

On the first of these questions, for the reasons more fully developed in the opinions of my noble and learned friends to which I have referred, I hold that there was a constructive total loss of the goods while they were still covered by the policy. The constructive total loss occurred when the German captain obeyed the instructions of his government and held the goods as the subject and servant of that government instead of holding them as the bailee of the assured. That was, in the circumstances, a restraint of princes or peoples. Normally, there can only be a claim for a constructive total loss if notice of abandonment has been given, but it is conceded that the appellants here do not rely on the absence of such notice. Indeed, they could hardly do so, for it is agreed that the assured knew nothing of the fate of the goods until it was too late for the underwriters to gain any advantage from such notice. It follows from s. 62 of the Marine Insurance Act, 1906, sub-ss. 3 and 7, that lack of notice would be excused.

So far, I think, the learned trial judge would find himself in agreement with the Court of Appeal and with my own view. But the second question then arises, namely, whether the frustration clause operates to take away from the assured the right, which would otherwise be his to claim, as above, for a constructive total loss. On this, the crucial issue, my view is entirely that expressed by Scott L.J. and MacKinnon L.J. When goods are insured under a voyage policy, the subject-matter of the contract is, of course, the goods engaged in the adventure. Loss of or damage to the goods on the voyage gives rise to a valid claim. But since the decision in this House in *British and Foreign Marine Insurance Co., Ld.* v. *Samuel Sanday & Co.* (1), it has been finally settled that, even though the insured goods are safe, a claim under the policy may be validly based on loss of the adventure by reason of a peril insured against. MacKinnon L.J. puts the matter most clearly thus (2): "The subject-matter "of the contract is, of course, the goods, and they are insured "against loss or damage by insured perils. But, even if the "goods are not so lost or damaged, there is an *additional*

(1) [1916] 1 A. C. 650. (2) [1941] 1 K. B. 250.

"insurance against the loss of their voyage. The learned "judge considers this to be not an *additional* risk, but an "essential part of it in every case, whereas the two quotations "from Bailhache J. and Lord Reading C.J. [in *Sanday & Co.* "v. *British and Foreign Marine Insurance Co., Ld.*] which he "cites just afterwards, both make it clear that this is only an "additional risk. Bailhache J. says: 'It is not true that in "'a policy of this kind the goods only are insured. Their "'safe transport and arrival are also insured,' and Lord "Reading used almost identical words."

The question, therefore, is whether, in the circumstances which we are considering, the claim of the respondents is "based "upon loss of, or frustration of, the insured voyage or adventure "caused by arrests, restraints, or detainments of kings, princes, "peoples, usurpers, or persons attempting to usurp power." If any and every claim for loss of goods by war perils is rendered futile by the insertion of the frustration clause, the policy, so far as loss by war perils is concerned, is perfectly useless. Such a result is, no doubt, possible if clear and apt words are used with the result that the underwriter takes away with one hand what he gives with the other. But it seems to me that the fallacy in the argument arises from assuming that every loss of goods is "based upon loss of the adven-"ture." I agree with the Court of Appeal in thinking that the proper interpretation of the frustration clause is not "free of any claim which on the facts might be based "on loss of the insured voyage," and that its proper meaning must be "free of any claim which is in fact based, "because it can only be based, upon loss of the insured "voyage."

These considerations have led me to the conclusion that the main contention of the underwriters must fail. I have not overlooked the variations in the main problem which are introduced by the special facts in each case, or the arguments addressed to us on the subject of deviation, and (in the case of the *Wangoni*) of an alleged offer under which the goods might be redeemed at a price. On these and other matters, with which I have not expressly dealt, I agree with the conclusions arrived at in the opinions of my colleagues to which I have referred.

I move that the appeals be dismissed.

VISCOUNT MAUGHAM. My Lords, your Lordships have before you appeals relative to three different claims by British cargo owners against Lloyd's underwriters on three different policies in or closely approximating to standard form. The cases are described as test cases, and the facts in each case have been set out in agreed statements. It is unnecessary for me to repeat these statements in any detail. The goods were carried in three ships, the *Minden*, the *Wangoni* and the *Halle*, all of them German-owned vessels. The assured cargo owners (respondents) and the underwriters (appellants) are British. War between Great Britain and Germany broke out on September 3, 1939, after the three ships had started on their voyages, and it is agreed that, as from that date, there was an effective blockade of all German ports by the British and French naval forces who were further taking all possible steps to intercept, capture or destroy all German merchant vessels on the high seas. It is also agreed that at all material times the German government, in furtherance of German war policy, had taken control of all German owned merchant shipping and had given orders to all such vessels and their masters to take refuge in neutral ports and if possible to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels.

In each case the assured claimed for a loss of goods under the policy. The losses were claimed to have arisen in the following circumstances: the *Minden* sailed from Buenos Aires on her voyage for Durban as her first port of call with the insured goods on board. She arrived at Santos on August 24, 1939, and left on the same day She arrived at Rio on the following day, and left on September 6, 1939, but not for Durban. When off the Faroe Islands on September 29, 1939, she was scuttled in the presence of a British warship by those on board of her and was lost with all her cargo. The *Wangoni* left Bremen for South Africa with Cape Town as her first port of call, but she did not proceed thither. On August 29, she put into Las Palmas and returned thence to Vigo, Spain, on the same day. She arrived at Vigo on September 1, 1939, and remained at that port until February 10, 1940. On February 10, 1940, she sailed for Hamburg, where she arrived on March 5, 1940, having managed to run the British and French blockade, which was then in full force. The goods of the assured remained on board throughout, but on two occasions offers were made to release the said goods to the assured on terms which were not accepted. This circumstance has led to a special contention which is made only in this case. The *Halle* sailed from Bunbury, Australia, for London via the Cape of Good Hope. The *Halle* passed the Cape of Good Hope on August 18, 1939, and on a normal voyage she would have reached London about September 16. Instead of proceeding to London, the *Halle* put into Bissao, Portuguese Guinea, on September 6, and remained there until October 13, when she sailed, and three days later scuttled herself in the presence of a French warship and was lost with all her cargo. It is obvious that the German master in each of these cases determined to obey the instructions of the German government and ceased to hold the goods as the bailee of the assured, namely, in the case of the *Minden* at Rio, in that of the *Wangoni* at Vigo, and in that of the *Halle* at Bissao. Sailings from these three ports were plainly sailings by the masters acting in obedience to orders of the German government.

At no time was any notice of abandonment given by the assured to the underwriters and no additional premium in respect of any deviation or change of voyage was ever tendered or paid. The underwriters, however, do not desire to found any argument on the absence of notice of abandonment and are willing to treat these cases as if such notices were given at any relevant time or times before the actions were begun.

The policies are not precisely in the same terms, but the differences for present purposes are not material. Taking the *Minden* policy as the exemplar, the insured perils include: "men of war . . . . enemies . . . . surprisals, takings at sea, "arrests, restraints and detainments of all kings, princes "and people . . . . and all other perils, losses and misfortunes "that have or shall come to the hurt, detriment or damage "of the said goods and merchandises." This ancient list of perils is brought up to date by the first of the Institute War Clauses, which says, "This policy covers . . . . loss of or damage "to the property hereby insured caused by (1.) . . . . the consequences of hostilities or warlike operations . . . . (2.) mines "torpedoes bombs or other engines of war." Lastly, there is the so-called frustration clause : "Warranted free of any claim "based upon loss of, or frustration of, the insured voyage or "venture caused by arrests restraints or detainments of kings "princes peoples usurpers or persons attempting to usurp "power." The frustration clause is precisely the same in all three policies, and it is on the true construction of that clause that the main argument for the underwriters has been rested.

My Lords, the underwriters in substance raise three points on this appeal. First, they say that all three claims are barred by the frustration clause. Secondly, they contend that, even if this is wrong, they are entitled in all three cases to an additional premium for deviation or change of voyage. Thirdly, they say, in the case of the *Wangoni*, that there was no constructive total loss of the goods or, alternatively, no such loss by perils insured against within the terms of s. 60 of the Marine Insurance Act, 1906. It was also argued that in all three cases (although, apart from the frustration clause, constructive total loss of the adventure was admitted) it had not been established that there had been (apart from all other points) a constructive total loss of the goods before the underwriters had ceased to be on the risk, either by reason of the constructive total loss of the adventure or for some other reason. This point failed before the trial judge and in the Court of Appeal. Anything further that was said on this point in the careful argument before your Lordships will be dealt with in the speeches of my noble and learned friends Lord Wright and Lord Porter, to which I cannot usefully add anything.

It was not contested before your Lordships that in the three cases, but for the frustration clause, there would have been a constructive total loss by loss of the insured voyage or adventure, but, as I understood the argument, it was contended that in the events which happened there was a loss of the adventure when the German masters departed from the insured voyages and started to obey the orders of the German government, and from that time it was said the risks were at an end, so that subsequent loss of the goods would not expose the underwriters to liability. I think it may be useful to consider the precise meaning of the technical phrase "loss of "adventure," and incidentally to explain why it is that in the case of a policy on goods in normal form the owner can claim either for loss of goods or loss of adventure, while in the case of a policy on the ship the underwriters are liable only on loss of ship and are not liable in respect of loss of adventure.

It is well known that until the end of the sixteenth century marine insurance was carried on in this country mainly by aliens, native of countries where marine commerce had long flourished, and that the earliest legislation on the subject comes from Genoa and Florence. Your Lordships will pardon me for mentioning that a curious side light on this circumstance may be found in the word "argosy," so often used by Elizabethan writers, for, according to the dictionaries, it is said to be derived from the Italian, "Ragusea," *i.e.*, a ship belonging to Ragusa, the great medieval port on the Adriatic. An account of the origin of the contract of marine insurance will be found in Professor Holdsworth's History of English Law, 2nd ed., vol. viii., p. 274, et seq. He refers the reader to an interesting and learned work called Beusa's Histoire du Contrat d'Assurance au Moyen Age (translated from the Italian by Valéry, Paris, 1897). From this and other books it appears that, from the first, the contract of marine insurance was one of indemnity, and that the insurance was generally for a voyage by a prescribed route. It is stated that as regards goods it often happened that it was necessary to tranship the goods to another vessel, particularly, it is said, in cases where the goods were bound from a Mediterranean port to an ocean port and the ship in which the voyage began did not travel beyond Cadiz or Lisbon. Since it was not possible in such cases to state the name of the ship in which the goods were to arrive, it became usual as regards goods to treat the risk as continuing until the goods had been unloaded at the port of destination. Moreover, it is clear that in many cases a merchant sending goods from the Adriatic to, say, a British port would suffer grievous loss if the goods were unloaded at another port on the Adriatic. At a very early date this was held to justify a claim described as for "loss of adventure" or some similar phrase. There was published at Rouen about the year 1600 a little book called "Le Guidon de la Mer" which contains some forms of marine policies then in use and a general account of marine insurance. In chapter 7 there are descriptions of a total loss entitling the insured to abandon. One example is "If the damage exceeds *half the value of the* "*thing, or if the voyage be lost* (my italics); or so disturbed "that the pursuit of it is not worth the freight." This passage certainly does not support the view that the goods are not insured apart from the voyage and it is interesting to note that it was cited by Lord Mansfield in *Hamilton* v. *Mendes* (1). See also *Goss* v. *Withers* (2) in which Lord Mansfield explains the commercial considerations on which the doctrine of constructive total loss is founded.

It is clear that the position of underwriters with regard to a policy on a ship is entirely different from that of the owner of merchandise. The ship is essentially mobile. In old days it might often be carried by the winds to a port far from the one intended, the situation of which indeed might depend on the courage, skill or discretion of the master. Nor would the shipowner necessarily suffer loss by reason of the ship not completing the intended voyage but reaching some other port. It is easy to see how many difficult questions would have arisen between underwriters and assured if the policy had been treated in the usual case as extending to an indemnity in respect of loss of adventure. It is now well settled, contrary to the opinion of Lord Mansfield in *Milles* v. *Fletcher* (3), that the loss of the voyage has nothing to do with the loss of the ship.

(1) (1761) 2 Burr. 1198.
(2) (1758) 2 Burr. 683.
(3) (1779) 1 Doug. (K. B.) 231.

Returning to the case of a marine policy relating to goods, it seems to me that, putting aside for the moment the technical terms which have long been in use, the policy in its essence is a contract by the underwriters to indemnify the assured either for losses (total or partial) of the goods themselves or for losses he may sustain by reason of the goods not arriving in safety at their destination though the goods themselves are in safety and uninjured, and in either case as a direct consequence of one of the perils insured against: see, for a very similar statement, the judgment of Lord Reading C.J. in the Court of Appeal in *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (1).

If that is correct, I am quite unable to see why the assured in the present case should not be able to claim indemnity simply on the basis of loss of goods and as if the doctrine of loss of adventure had never been accepted as part of our maritime law. The contract is an insurance against loss of two different kinds in relation to the goods. The first involves loss of or damage to the goods themselves; the second involves merely that they have not reached their destination though they may be perfectly safe. The frustration clause, on this view, is in my opinion free from ambiguity. It relieves the underwriters in the cases we are dealing with from liability under the second head, but it leaves their liability unaffected as regards cases under the first head, provided, of course, that the risk has not come to an end. The learned trial judge, misled I think by a somewhat incautious statement by that very experienced judge Bailhache J. in *Sanday's* case (2), repeated without comment in the Court of Appeal by Swinfen Eady L.J. (3), took the view that what was insured by a marine policy was "merely "the adventure." This, with all respect, was a mistake. Both as a matter of history and of commercial good sense the main and primary subject of the insurance on goods under such a policy is the goods as tangible chattels. The liability for loss of adventure is one of a somewhat artificial character, and it appears to have been added to the indemnity in respect of loss of or damage to goods by perils insured against. I can find no trace in any of the old works of authority for the view that a claim for loss of goods has in the past been regarded as a special kind of claim for loss of adventure, and such a view (as was forcibly pointed out in the Court of Appeal) would lead, if logically pursued, to very strange results. Nor can I find anything in Phillips on Law of Insurance or in Arnould on Marine Insurance which supports that view. Historically it is reasonably clear that the goods were first the subject-matter of the insurance and then that the loss of the voyage came to be regarded as involving a (constructive) total loss of the goods provided there was an abandonment in due time: see *Barker* v. *Blaker* (1), where Lord Ellenborough C.J. explains his view of loss of voyage.

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(1) [1915] 2 K. B. 781, 811.
(2) Ibid. 784.
(3) Ibid. 819.

My Lords, it is beyond dispute that the frustration clause was introduced into Lloyd's marine policies shortly after the decision of this House in *British and Foreign Marine Insurance Co., Ld.* v. *Samuel Sanday & Co.* (2). That, however, was a case where the cargo owners were compelled to base their claim on "loss of voyage." That followed from the circumstance that the British ships concerned were in substance compelled after the outbreak of the war in 1914 to abandon the contract voyage and to proceed to British ports. In fact, the cargo owners warehoused the goods in England and gave notice of abandonment. This, no doubt, leaves open the argument that the frustration clause is so framed that it applies in the present cases as well as in those cases, but the history of the clause does not itself suggest a ground for holding it to have been designed to protect the underwriters against a wider risk than that which occasioned their liability in *Sanday's* case (2), namely, against the risk of claims for loss of goods caused by restraints of princes as well as for claims based on loss of the insured voyage so caused. (I shall call this the wider effect.) The first thing that occurs to one is that it would have been exceedingly easy to draft the clause so as undoubtedly to have this wider effect if that had been the intention. Next, if the matter is left in doubt, the clause must be construed contra proferentes, plainly in this case the underwriters.

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(1) (1808) 9 East. 283, 294.

(2) [1916] 1 A. C. 650.

It might be sufficient in the circumstances to leave the problem here, but further examination of the clause seems to me to show that it is deliberately framed so as to have the narrow construction. For my part, I attribute some importance to the fact that the clause is limited to claims "based "upon" the loss of, or frustration of, the insured voyage. The words in their natural meaning point to the way in which the claims are framed, and cannot easily be read as extending to claims which might truly be said to be occasioned by the loss of, or frustration of, the adventure, but are really based on loss of or damage to the goods themselves. I agree that the important words are "loss of, or frustration of, the insured "voyage."

I do not take the view that the insurance had come to an end before the loss in each case occurred, but I am aware that some of your Lordships are dealing exhaustively with this point, and I shall merely state very shortly that I agree on the same grounds. The deviation of route to Santos and Rio in the case of the *Minden* was, I think, excused by s. 49, sub-s. 1 (*b*), of the Act as being caused by circumstances beyond the control of the master and his employer. It was not the voluntary act of the master: compare the analogous position in *Sanday's* case (1). The subsequent change of voyage was not, within the terms of s. 45 of the Act, "a change of voyage "discharging the insurer from liability," for the reason that the destination of the ship was not *voluntarily* changed since he was acting on orders which he was at least morally bound to obey, see *Phelps* v. *Auldjo* (2). There being neither a change of voyage within s. 45, nor a deviation other than one which was permissible, no extra premium was payable. The same considerations apply in substance to the *Halle* and the *Wangoni*.

There was in each case a loss to the assured of his goods by restraint of princes, either when the master of the ship set out for a German port in pursuance of the German government's

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(1) [1916] 1 A. C. 650.

(2) (1810) 2 Camp. 350.

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RICKARDS v. FORESTAL LAND, TIMBER AND RAILWAYS CO.

ROBERTSON v. MIDDOWS, LD.

KAHN v. W. H. HOWARD BROTHERS & Co.

Viscount Maugham

orders or it may be before: *Robertson* v. *Petros M. Nomikos, Ld.* (1), see per Lord Wright (2) and per Lord Porter (3).

Taking the view that I do of the twofold nature of a marine insurance on goods, I am unable to accept the argument that the cargo owners are precluded from claiming in respect of the loss of goods as chattels by restraint of princes because the same event might have justified, but for the frustration clause, a claim based on a loss of the insured voyage or adventure. The same peril affected two different aspects of the subject-matter, and one of these, the goods themselves, is not affected by the frustration clause. I agree with Hilbery J. and the Court of Appeal in thinking that in the cases of the *Minden* and the *Halle* it was "unlikely" (using the word employed in s. 60, sub-s. 2 (i.), of the Act) that the assured could recover their goods. Their losses were in fact converted into actual total losses by the subsequent scuttling, and while the goods were still covered by the policies: see *Mellish* v. *Andrews* (4). But, apart from this, I am of opinion that the owners were unlikely to recover the goods after the time when the orders of the German government were acted on and that the goods then became constructive total losses and might have been "reasonably abandoned" (s. 60). As regards the *Wangoni* I can see no essential difference in that case except as regards the suggestion of discharge of the goods at Vigo. My noble and learned friends Lord Wright and Lord Porter are about to deal with that aspect of the case. I could not adequately state my view of the correspondence relative to the suggestion except at some length, and I think it sufficient to say that I entirely agree with the opinions which they will express in relation to it and to the subsequent events attending the *Wangoni* after it reached Hamburg.

I agree, therefore, in all three cases with the Court of Appeal and am of opinion that the three appeals should be dismissed.

LORD THANKERTON. My Lords, as I find that the opinion of my noble and learned friend Lord Porter, which I have had the privilege of considering, expresses the views which I have formed in these three appeals, I find it unnecessary to do more than express my concurrence in that opinion.

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(1) [1939] A. C. 371.
(2) Ibid. 382.
(3) Ibid. 391.
(4) (1812) 15 East. 13.

LORD WRIGHT. My Lords, these three separate appeals were heard together. The cases, which were likewise tried together in the courts below, were chosen as test cases to obtain the guidance of the court on questions of principle which had arisen as to the effect of policies of marine insurance issued by British underwriters on goods the property of British subjects which were at the outbreak of war being carried in German vessels to British or colonial ports. The questions arose because the German masters, acting under orders of the German government, had at first put into neutral ports, then had proceeded to make for Germany, and either had, as happened in two of these three cases, been scuttled when intercepted by British or allied warships, or had, as happened in the third of the cases, succeeded in evading the blockade and in reaching a German port with the goods on board. The policies under which the goods were insured on the particular voyages covered (inter alia) war risks, but subject to an excepting clause, conveniently referred to as the " frustration clause " the terms of which were that the underwriters were warranted " free of any claim based upon loss of, "or frustration of, the insured voyage or adventure caused by "arrests restraints or detainments of kings princes peoples "usurpers or persons attempting to usurp power." The trial judge, Hilbery J., held that the assured had succeeded in establishing in each case a constructive total loss of the goods, but that the underwriters were entitled to judgment because they were relieved from liability by the frustration clause. This decision was in each case reversed by the Court of Appeal, and the several underwriters were held liable. They now appeal from these decisions to this House. There were other questions involved, but the principal question was as to the construction of the frustration clause.

Though the three cases raised the same general principle, there were differences between them which, your Lordships were told, had led to the selection of three test cases, instead of one. I think it best to follow the course adopted in the courts below, and deal with each case separately, in the order in which they appear in the list. I shall examine the general questions at some length in considering the first appeal. In the other two appeals it will then be enough to deal with the special features which they present.

In the first appeal, which I shall refer to as the *Minden*, the respondents, the Forestal Land, Timber and Railways Company, Ld., insured with the appellant underwriter, Edward Rickards, a quantity of quebracho wood extract, shipped by the respondents in the *Minden*, a German vessel, at Buenos Aires, under a bill of lading dated August 16, 1939, for Hong Kong/Shanghai option, and including transhipment at Durban. The policy was against the usual risks, and included war risks, but was subject to the frustration clause. The bill of lading contained wide liberties to deviate, which were incorporated in the policy. The *Minden* sailed from Buenos Aires, with Durban as her first port of call, towards the end of August, 1939. She should normally have reached Durban about September 15, 1939, but, having turned northwards off her course, she reached Santos, in Brazil, on August 24, 1939, and sailed again on the same day for Rio, where she arrived on August 25, 1939. She left Rio on September 6, 1939, and on September 29, 1939, she was scuttled by those on board off the Faroe Islands in the presence of a British warship. All her cargo, including the respondents' goods, was lost.

A statement of facts was agreed, and it was also agreed that the court should have liberty to draw inferences of fact. The material facts agreed (in addition to those already stated) were that on and after September 3, 1939 (when war broke out), there was risk of capture whenever the *Minden* was outside the territorial waters of any neutral State; that, as from that date, there was an effective blockade of all German ports by the British and French naval forces, which were further taking all possible steps to intercept, capture and destroy all German vessels on the high seas; that at all material times the German government in furtherance of German war policy had taken control of all German-owned merchant vessels and had given orders to all such vessels and their masters to take refuge in neutral ports and, if possible, to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels; and that at no time was any notice of abandonment given by the assured to the underwriters and no additional premium in respect of any deviation or change of voyage was ever tendered or paid.

The learned judge drew certain inferences of fact, which have not been contested. These are in substance that the master of the *Minden*, having the orders of his government in hand, decided to go to Rio via Santos and there wait to see if war came, and that the master's intention was to stay at Rio for a while (the pre-war crisis being then at its height) and if war did break out to make his decision then, either to stay there or to go back to Germany, running the British and French blockade if he could, or, if not, to scuttle the ship. The learned judge was of opinion that there was a constructive total loss when the master did the overt act of sailing from Rio after the outbreak of war in obedience to the orders of his government, and that the loss was a loss by restraint of princes. "The acts," he said, "of the master in thus restraining the plaintiff's goods were done in obedience to the "paramount orders of the government to which he owed "allegiance. In doing the acts he was not acting for himself "or his owners; he was the agent of the German government. "His act was the act of that government." The learned judge also found that it was more unlikely than not that the assured would recover the goods after the vessel sailed from Rio. But he held that, though there was a constructive total loss when the ship sailed from Rio, the underwriters were relieved from liability by the frustration clause. As to the alternative claim for an actual total loss when the vessel, with the goods on board, was scuttled, he held that the assured could not recover, because the underwriters were not on the risk at that time, the insured adventure having been entirely abandoned at Rio. The constructive total loss which, as he held, occurred at that stage was not, in his judgment, recoverable because it was barred by the frustration clause. Thus the cargo owners had, on the judge's view, no claim under the policy. The Court of Appeal were of opinion that the constructive total loss which they, like the judge, held had occurred at Rio, was not excepted by the frustration clause. Accordingly, they decided that the cargo owners were entitled to succeed in their claim. The appellant underwriter did not in either court rely on the absence of notice of abandonment.

It was in both courts, in my opinion, rightly held that the act of the master in sailing from Rio constituted a restraint of princes within the words incorporated in the policy: "capture "seizure arrest restraint or detainment . . . . also the con-"sequences of hostilities or warlike operations." These words were intended to repeat the words printed in the body of the policy, "enemies, ... takings at sea, arrests, restraints "and detainments of all kings, princes and people." It is also clear that it is this peril or class of perils which is dealt with in the frustration clause. Diversity of expression in respect of the same matter is common in marine insurance policies. It is notorious that a policy of marine insurance is in many ways an obscure, loosely drawn, and inaccurate instrument, if I may quote from the language of such judges as Lord Mansfield, Chief Justice Marshall in the United States, Buller J., and others. The form of the modern policy has grown up on the basis of the traditional policy, the origin of which dates back to the middle ages. The particular policy in question here, which is in fact simply a policy on goods, states that it is also upon "the body, tackle, apparel, ordnance, munition, "artillery, boat and other furniture, of and in the good ship "or vessel called the *Minden*," but no one attends to these words because everybody knows that it is the goods which are insured. The policy is further complicated by the practice of adding clauses and also of superimposing attached slips, all of which may have to be taken into account. At the same time it must be remembered that the uncertainties and obscurities in the policy may be largely attributed to the subject-matter. As Phillips remarks in his Insurance, vol. i.,

p. 5 (Boston, 1867): "A contract embracing so many interests "and parties and liable to be affected by so many events "cannot but be subject to some difficulties of construction, "however carefully it may be drawn." In England the codifying Act, the Marine Insurance Act, 1906, has done much to simplify the law, but it would be an insufficient guide were it not supplemented by the decided cases. Indeed, s. 91, sub-s. 2, in terms provides that "the rules of the common "law, including the law merchant, save in so far as they are "inconsistent with the express provisions of this Act, shall "continue to apply to contracts of marine insurance." The Act is merely dealing with a particular branch of the law of contract, namely, contracts of marine insurance. Subject to various imperative provisions or prohibitions and general rules of the common law, the parties are free to make their own contracts and to exclude or vary the statutory terms. The object both of the legislature and of the courts has been to give effect to the idea of indemnity, which is the basic principle of insurance, and to apply it in the diverse complications of fact and law in respect of which it has to operate. In this way the law merchant has solved or sought to solve the manifold problems which have been presented by insurances of maritime adventures.

The definition of restraints of princes in r. 10 of the first schedule to the Act is not very helpful in this case, but it does define the peril as including executive acts. Was what the master did an executive act of the German government? I think it was. Arrests of kings, princes and peoples are generally carried out by commissioned officers in the naval or other employment of the particular state and generally involve some exercise of force, or, at least, the threat of a force locally present, though in the background. What happened here was that the master, being in possession of the goods as a carrier for the assured, seized them in the sense that he ceased to hold them as carrier and changed the character of his possession by taking and controlling them as agent for the German government with the intention and effect of holding them adversely to the assured and applying them to the hostile purposes of his government. In doing so he deprived the assured of them. The courts below have rightly fixed the overt act of hostile seizure as being committed when the master sailed from Rio. His act could not be regarded as piracy because he did it on express orders from his national government. Nor could it be called barratry, because it must be assumed that his owners were equally with himself sympathetic with or subject to the orders of the German government. That an enemy subject may commit an act of hostilities for his government in a foreign country, even without express orders, was illustrated by *Atlantic Mutual Insurance Co.* v. *King* (1), where during the last war a German was found to have placed an infernal machine in the hold of an English ship in New York harbour, with the purpose and effect of damaging her cargo when it exploded. He was held to be an agent of the enemy, because, as Bailhache J. said (2): "Knowing that the settled and concerted policy of that government "is to avail itself of the efforts of its subjects, whether "naval, military or civilian, to destroy enemy life and property, "as occasion offers, he uses such opportunity as presents itself "in furtherance of that policy." This is an even stronger case because when the master took control of and seized the goods he did so on express orders. It is also clear that a restraint may operate without any display of force. The master was actually in possession of the goods throughout. He simply took them from the assured by dealing with them adversely to their interests and throwing off the role of a private carrier in which capacity he had held them up to then as bailee for the assured. The restraint which was operating on the master was the compelling force of the German State to which he was subject. In one sense it was a moral compulsion, but in another sense it was more because it may be assumed that he was aware that, if he had disobeyed the order, his government had means of vindicating its authority if not at the moment, at least subsequently. In *Miller* v. *Law Accident Insurance Co.* (3), the master, in obedience to a sanitary order of the

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(1) [1919] 1 K. B. 307.
(2) Ibid. 313.
(3) [1903] 1 K. B. 712.

Argentine government, after arrival at Buenos Aires, the port of destination, took the cattle out of the port and abandoned the adventure. Though no actual force was used or displayed, the order of the Argentine government had behind it the power of the state. Lord Sumner in *Becker, Gray & Co.* v. *London Assurance Corporation* (1), thus sums up the situation : "Stirling L.J. expressly says that the captain did not act "voluntarily. The frustration of the adventure was caused "by the direct operation of an order which was an act of "state and was backed by the existence of available force "though its employment proved to be unnecessary." There, it is true, the vessel had actually come within the area of compulsion, whereas in this case Rio was a neutral port, outside the territorial sovereignty of the German government. I do not regard that as a material distinction in a case like this.

There is perhaps no exact counterpart in the books, but a close analogy is presented by *British and Foreign Marine Insurance Co., Ld.* v. *Samuel Sanday & Co.* (2). There masters of British vessels carrying British goods to Hamburg, in the first days of August, 1914, when in, or approaching, the English Channel, were informed of the outbreak of war, whereupon they abandoned the voyage to Germany and were diverted to British ports. It was held that there was a loss of the goods by restraint of princes. Lord Loreburn's concise summary of the decision of this House in that case is very apposite to the present question. He said (3), that on the outbreak of war trading to German ports became unlawful and an instant duty arose for those two ships to discontinue their voyage to Hamburg. The adventure of carrying this merchandise to its destination became in law a serious offence and in fact impracticable. This does not, indeed, afford a strict parallel. The restraint there invoked was that of English law in its operation on British subjects. But it shows that there may be a restraint, though the physical force of the state concerned is not immediately present. It is enough, I think, that there is an order of the state, addressed to a subject of that state, acting with compelling force on him, decisively exacting his obedience and requiring him to do the act which effectively restrains the goods. Thus the seizure or restraint effected in obedience to that order becomes, in a case like the present, the belligerent act of the German government though it is committed by the master of a German merchantman, on the high seas or in neutral territory.

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(1) [1918] A. C. 101, 115.
(2) [1916] 1 A. C. 650.
(3) Ibid. 658.

I may here deal with the question of the deviation of the vessel when she left the contract voyage to go first to Santos and then to Rio, and waited at Rio until September 6, 1939. It is clear that the master made the deviation as a precautionary measure, in obedience to the orders to take refuge in a neutral port, when the imminence of war became apparent. This was clearly in furtherance of German war policy and under German government control. Thus, it was not the voluntary act of the master, any more than it was in *Sanday's* case (1) or *Miller's* case (2). It was the direct effect of the restraint. As to the change of voyage, the acts of the masters were equally not voluntary. The deviation thus comes within the protection of s. 49, sub-s. 1 (*b*), of the Act, which enacts that deviation is excused (inter alia) where it is caused by circumstances beyond the control of the master and his employer. Here the deviation was caused by circumstances beyond the control of the master, who was, as already stated, bound to obey the orders of his government equally with his employer, the German shipowner. The deviation was certainly beyond the control of the assured, if that is material. It may be doubted if at any time before the actual outbreak of war, there was a change of voyage, but there was a change of voyage when the vessel sailed from Rio on the voyage or adventure to run the blockade on the orders of the German government. That change of voyage was certainly not voluntary. On that ground, therefore, it could not be said that the insurer was discharged from liability under s. 45, sub-s. 2, of the Act, because the change of voyage which discharges the underwriter is defined in s. 45, sub-s. 1, and the definition includes the element that the voyage is voluntarily changed. I, accordingly, see no reason why recourse should be made to the "Held Covered" clause in the policy, or to the bill of lading liberties, though these are sufficiently wide and are in this case incorporated in the policy. The change of voyage was act and part of the hostile seizure.

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(1) [1916] 1 A. C. 650.

(2) [1903] 1 K. B. 712.

I now turn to consider whether this operation of the insured perils caused a constructive total loss of the goods, as Hilbery J. and the Court of Appeal have held. Prima facie, when once it is accepted that there has been a seizure or capture of the goods, there is "the right of abandoning immediately; and "this right subsists so long as the property is detained by "the captors or by their government, whether in port or at "sea" (Phillips, op. cit. vol. ii., p. 319). Here there was a capture or seizure of the goods by the German government acting through the master and the seizure or capture continued until the ship was scuttled. But a more careful examination of the doctrine of constructive total loss, as set out in the Marine Insurance Act, 1906, is here necessary in order to deal with the decision of the learned judge on the frustration clause and the exhaustive arguments addressed to your Lordships by Mr. Miller.

The concept of constructive total loss is peculiar to marine insurance. Its main characteristics are now defined in s. 60 of the Act. Sub-sect. 1 provides that "Subject to any express "provision in the policy there is a constructive total loss "where the subject-matter insured is reasonably abandoned, "on account of its actual total loss appearing to be unavoidable, "or because it could not be preserved from actual total loss "without an expenditure which would exceed its value when "the expenditure had been incurred." Sub-sect. 2 says: "In particular there is a constructive total loss—(I.) Where "the assured is deprived of the possession of his ship or goods "by a peril insured against, and (*a*) it is unlikely that he can "recover the ship or goods, as the case may be, or (*b*) the cost "of recovering the ship or goods would exceed their value "when recovered." I need not here quote the rest of the sub-section.

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It has been observed that this section raises great difficulties of construction. That is perhaps inevitable, and it is certainly excusable when it is sought in a brief section, supplemented though it is by ss. 61 to 63, to embody the complicated problems of law and fact which experience has shown to arise in the case of a constructive total loss. Some aspects of the section have been recently discussed in this House in *Robertson* v. *Petros M. Nomikos* (1). In particular, the difficulty of fitting together the two sub-sections of s. 60, and reading them together with s. 61 was there considered. I think the view which this House arrived at was that the two sub-sections contain two separate definitions which may be applied to different conditions of fact. Thus an assured can base his claim on the terms of sub-s. 2, which give an objective criterion in each case, ship, goods or freight, not only more precise but substantially different from that in sub-s. 1. Sub-sect. 2, as compared with sub-s. 1 is thus cumulative, not merely illustrative. In the present case the assured rely on sub-s. 2 (i.) (*a*) and say that they were deprived of the possession of the goods by a peril insured against, and that it was unlikely that they could recover them. But this raises a number of questions. First, what is the point of time to be taken in ascertaining whether there was a constructive total loss ? A constructive total loss is a device intended to subserve the purpose of indemnity by enabling the assured, when, by insured perils, the postulated danger of loss or deprivation is caused, to disentangle himself, subject to definite limits and conditions, from the danger and throw the burden on the underwriters. If the assured elects to avail himself of this option, he must do so by giving notice of abandonment within a reasonable time after the receipt of sufficient information. He is not allowed to await events to see how things turn out, or to decide what may best suit his interests. If he duly elects to abandon on good grounds, the risk is ended, because the assured can recover as for a total loss and the salvage vests in the underwriter. By the English common law the date of giving notice of abandonment was not treated as the decisive date, which was taken to be at the date of issuing the writ in the action. This was fully established by a number of authorities dating back at least to Lord Mansfield's time. These authorities were collected by Collins J. in *Ruys* v. *Royal Exchange Assurance Corporation* (1). The Marine Insurance Act is silent on the point, and this has led to some question, which Lord Sumner in *Captain J. A. Cates Tug and Wharfage Co., Ld.* v. *Franklin Insurance Co.* (2) found it unnecessary to consider. But in *Polurrian Steamship Co.* v. *Young* (3), where in the changing circumstances it was material to determine what was the material date at which the justification for giving notice of abandonment was to be judged, the Court of Appeal accepted the date of the commencement of the action. They thus held that the Act had not changed the old rule. In my opinion, this was the sound conclusion. Sect. 91, sub-s. 2, requires that, if the old rule is to be abrogated, the express provisions of the Act must be inconsistent with the old rule. I cannot find any such inconsistency in s. 60 or s. 61 or elsewhere in the Act. The law of Scotland is different on the point, and weight has been attached in some quarters to the fact that the draft of the Act was changed by omitting a section which expressly provided that the date of the writ should be the material date, but I do not appreciate how this can properly affect the construction of the actual words of the Act. The old rule is, I think, still the law. This point seems to me to be material in one of these appeals. As will appear, the question of the appropriate date is blurred in all these appeals by the fact that no notice of abandonment under s. 62 was ever given, but was waived by the underwriters under s. 62, sub-s. 8, so that, as I think, the assured can claim to fix the date of the notice at any time which suits him. As to the dates of the actions, they were in each case subsequent to the total loss of the goods, and so far as that goes the assured can rely on that date if he requires to do so in these actions.

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(1) [1939] A. C. 371.

(1) [1897] 2 Q. B. 135.
(2) [1927] A. C. 698, 703.
(3) [1915] 1 K. B. 922.

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I must next consider the meaning of the words "subject-"matter insured" in s. 60, sub-s. 1, or "goods" in sub-s. 2. Any controversy as to the meaning has been settled by this House in *Sanday's* case (1). In Lord Loreburn's words (2) "There are many things that may be at risk and in respect "of which insurance may be effected—ship, goods, freight, "profits and so on. There are also familiar, even antique "expressions constantly used from long ago in marine policies "and continued because they are well understood in the "business or have been interpreted by judges. This section "[s. 26] says that regard is to be had to any usage regulating "the designation of the subject-matter assured. The words "of this policy have for generations been understood and held "by judges to designate not merely the goods but also the "adventure. So far from abrogating this designation of the "subject-matter I should have thought the Act took pains to "preserve it and others like it." Lord Loreburn also referred to s. 91, sub-s. 2. In the Court of Appeal, Swinfen Eady L.J. dissenting had taken a more narrow and formalistic view of the word "goods," treating it as limited to the physical objects, but his reading of the word was rejected. I must revert to this matter when I consider the effect of the frustration clause.

The word "unlikely" did, however, involve a change in the old law. This matter was discussed and decided, rightly as I think, by the Court of Appeal in the *Polurrian* case (3). The insured steamer had been captured by the Greek government for carrying contraband of war during the war between Greece and Turkey in 1912. The captor took out of her the contraband cargo and put the vessel into the Prize Court, but the innocent carriage of contraband is not generally regarded, according to international law, as involving the condemnation of the vessel. The master denied that he knew that war was on foot when he was carrying the goods, but at the date of the issue of the writ his innocence was contested by the captors. It was, therefore, at that date "uncertain" if she would be released. At the date of the trial she had been released. It was held that while it was "uncertain" whether the assured would recover the vessel within a reasonable time, it was not in all the facts "unlikely" that they would do so. Kennedy L.J., in his judgment, quoted the authorities and stated the law before the Act to have been that, if the taking of the vessel out of the owner's possession was at the date of the commencement of the action to enforce his claim, a taking which still continued in operation, and the owner's loss of the use and disposal of the vessel, once total, was at that date one which might be permanent and was at any rate of uncertain continuance, the owner who had duly given notice of abandonment was by English law entitled to recover on his insurance for a constructive total loss, even though he had at the date of the trial recovered the subject of the insurance. The underwriter had to pay as for a total loss, but took the recovered subject as salvage. The learned Lord Justice found it difficult to reconcile the words "reasonably abandoned on account of its actual total loss appearing "to be unavoidable," in sub-s. 1 of s. 60, with the words "unlikely that he can recover the ship," but, taking the latter as the true test in the particular case, held that the statute had modified the pre-existing law to the disadvantage of the assured. I agree with that conclusion. There is a real difference in logic between saying that a future happening is uncertain and saying that it is unlikely. In the former the balance is even. No one can say one way or the other. In the latter there is some balance against the event. It is true that there is nothing in the Act to show what degree of unlikelihood is required. If on the test of uncertainty the scales are level, any degree of unlikelihood would seem to shift the balance, however slightly. It is not required that the scale should spring up and kick the beam.

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(1) [1916] 1 A. C. 650.
(2) Ibid. 657.
(3) [1915] 1 K. B. 922.

In the present case, in my opinion, it was unlikely that the goods would be recovered. The odds were all against it. When the *Minden* sailed from Rio under the orders of the German government it was, I think, not merely uncertain that she would evade the British blockade. It was, in my

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opinion, unlikely. If she had been captured it was, no doubt, likely that the assured would have regained possession of their goods, but the orders of the German government had provided against that contingency by requiring the master to scuttle the ship, as he in fact did. No doubt, the peril which would in that event have caused the loss was, strictly speaking, not arrests or restraints, but scuttling by hostile action, which would fall within the word " enemies " in the policy. Since *Samuel & Co., Ld.* v. *Dumas* (1), the loss could not be described as a loss by perils of the seas. If, on the other hand, she ran the blockade and reached a German port, the assured would presumably be irretrievably deprived of his goods, which is an actual total loss. Mr. Miller strenuously contended that, if there was a constructive total loss, which did not give the assured a claim because it was one for which, in virtue of the frustration clause, the underwriter was not liable, all possible claims under the policy were excluded, even though in the end the goods were totally lost by an insured peril. This argument found favour with the trial judge. It led MacKinnon L.J. to some severe strictures on the futility of such an insurance or pretended insurance against war risks and on its utterly unbusinesslike character. I agree with these strictures. But with all respect to the learned judge, the arguments are based on a misconception, quite apart from the effect of the frustration clause. If the sailing from Rio under the orders of the German government did not give a claim to a constructive total loss because, for instance, there was no proper notice of abandonment, still the insurance continued. As I have explained, the policy was not avoided by the deviation or change of voyage. The property in the goods still remained in the assured and was still covered by the policy. A failure to establish a constructive total loss does not in general prevent a later claim for an absolute total loss if changed circumstances justify it. This principle is illustrated by many reported cases and is clearly just and logical. I may refer, as an illustration, to *Stringer* v. *English & Scottish Marine Insurance Co., Ld.* (2), where on a capture the assured had not

(1) [1924] A. C. 431.
(2) (1869) L. R. 4 Q. B. 676.

elected to abandon, but later, when the capture had been followed by a sale of the ship, they were held entitled to recover as for an absolute total loss as to which there was no necessity to give notice of abandonment. Blackburn J., in delivering judgment (1), quoted the words of Lord Abinger in *Roux* v. *Salvador* (2), " The underwriter is not the less liable upon his "contract because the assured . . . . has postponed his "claim till that event of a total loss has become certain which "was uncertain before." A more recent illustration is afforded by *Woodside* v. *Globe Marine Insurance Co., Ld.* (3), where a ship had stranded but was still capable of being floated and repaired though at a price exceeding her repaired value. Thirty-six hours later she was completely destroyed by fire. The plaintiffs claimed for an absolute total loss by fire, which, as well as sea perils, was covered by the policy. Mathew J. in deciding in favour of the assured said : " The loss by stranding "would only become total if the assured gave timely notice of "abandonment. If none were given, the loss would be a "particular average, and it would seem clear law that a "particular average loss, however serious, could not impair "the right of the assured to recover for a subsequent total "loss upon the basis of the valuation."

I have referred to the question of absolute total loss, partly out of respect to the judge and to Mr. Miller's arguments, but also because in the next case (the *Wangoni*) it may seem material, as I think it was treated as being in the judgment of Scott L.J. But this case has proceeded on the basis of a constructive total loss when the ship sailed from Rio. The loss was never reduced or adeemed. Notice of abandonment was waived by the underwriters and in any event the vessel was finally lost before the assured knew what had happened or could abandon so that notice of abandonment was unnecessary under s. 62, sub-s. 7, of the Act. The only possible answer on this basis is the frustration clause.

The underwriter succeeded on that clause before Hilbery J., because of that judge's view that what was insured was the

(1) L. R. 4 Q. B. 676, 690.

(2) (1836) 3 Bing. N. C. 266, 287.

(3) [1896] 1 Q. B. 105, 107.

adventure alone. In his own words, the subject-matter of the insurance is the adventure of the goods on the voyage. The goods, he said, are not insured apart from the voyage. It is the voyaging with the goods or the goods on the voyage which is the subject-matter of the insurance. If, however, these words are compared with the language of Lord Loreburn in *Sanday's* case (1) quoted above, the fallacy I think will be clear. The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods. This is very old law. Lord Mansfield insisted on applying the same rule to an insurance on the ship, but his view was rejected and it was said that the loss of the voyage has nothing to do with the loss of the ship. The ship is a vehicle employed in general trading, not wedded to any particular adventure. Freight is regarded in ordinary practice as a separate interest capable of being separately insured in addition. As to goods, it is indeed true that profits can be separately insured by an appropriate policy, and also that the insurable value on goods under an open policy is their value, plus charges on shipment, not their arrived value; s. 16, sub-s. 3, of the Marine Insurance Act, 1906. But it has long been recognized that in a valued policy on goods it is permissible and indeed usual to value the goods so as to exceed their value on shipment. This practice is recognized by Arnould (Law of Marine Insurance, s. 343), where reliance is placed on the opinions expressed by Lord Ellenborough C.J. in *Forbes* v. *Aspinall* (2), and *Usher* v. *Noble* (3). Lord Ellenborough emphasizes that goods are generally sent to a profitable market. Thus, it is sometimes said that the policy on goods covers also loss of market, because the owner is generally shipping them for sale at a profit, but the advantage contemplated may be some other purpose of the assured, as, for instance, for use as raw material or machinery for his factory at the destination. I prefer the phrase "loss of the adventure." It follows that a policy on goods is in truth one covering a composite interest, the physical things or chattels, and also the expected benefit

(1) [1916] 1 A. C. 650.
(2) (1811) 13 East. 323.
(3) (1810) 12 East 639.

from their arrival. The subject-matter may be described as chattels-cum-adventure. It seems to follow inevitably that, if the goods are lost, the adventure is lost also. If they are damaged and suffer a partial loss, the adventure may or may not be lost. But the adventure may be lost even though the goods are neither damaged nor lost nor taken from the assured's possession or control. Such was *Sanday's* case (1), where the cargoes were safe on the carrying ships, but the adventure could not be completed because the port of destination had become enemy territory and hence the adventure of the British goods owners was frustrated. Another illustration is afforded by *Rodocanachi* v. *Elliott* (2), where parcels of silk, shipped from Japan to London, were detained on their way across France by the investment of Paris by the German armies in 1870. It was held that there was a constructive total loss by restraints of princes, which might extend to an indefinite time so as "to cause at least a "loss or failure of the particular adventure." In fact, the goods were undamaged and continued in the possession of the assured and their bailees. There was no exercise of dominion over the goods themselves but the warlike operations restrained the owner from dealing with his goods. It is not necessary to multiply examples of cases in which the loss claimed was loss of the adventure. To cases of that type the frustration clause has a clear and precise application, but in my opinion it cannot be applied to a case where the assured is claiming for loss of or damage to the actual physical things or chattels. He is entitled to resist the application of the clause on the ground that the primary subject-matter is the goods and that the adventure is merely ancillary or accessory. A claim in respect of the loss of the adventure is an added benefit granted to the assured over and above his interest in the goods themselves. The exception by its language is expressly limited to the loss of or frustration of the insured voyage or adventure. Its language cannot, in my opinion, be twisted to make it exclude a claim for actual loss of or damage to the goods themselves. Even if I felt

(1) [1916] 1 A. C. 650. (2) (1873) L. R. 9 C. P. 518.

any doubt about this, which I do not, I should still say that it is for an underwriter who has undertaken a particular insurance, if he desires to make exceptions from it, to do so in clear terms. An ambiguous exception is no defence. However, I do not think the exception is even ambiguous.

Mr. Miller sought to support his contention by saying that the case was analogous to one in which there was an exception clause taking particular perils out of the insurance. Here, he said, there was only one cause operating on the subject-matter at one and the same time and its effect was excepted. But, in my judgment, that is not a true analogy. It is true that there is only one subject-matter, namely, the composite subject which I have described as the chattels-cum-adventure. The same peril operating on that subject may simultaneously affect both aspects or ingredients of it just as much as it would if the separate aspects were separately insured, the chattel interest by an insurance on goods, and the adventure interest specifically as an insurance on profits. Either policy might then contain its own exceptions. On this analogy, which if not complete is sufficient for this case, what I may call the adventure interest is notionally severable from what I may call the goods or chattel interest. It seems clear on that footing that it is only the former which is affected by the frustration clause. The assured can claim for the loss of the goods or things or chattels without being harmed by the frustration clause. This conclusion is fortified by the history of the clause, which was undoubtedly invented from a desire to abrogate the effect of *Sanday's* case (1), where only the adventure was affected by the peril, the goods being unaffected. It would be wrong to construe the clause otherwise than in accordance with its actual language or treat it as limited in its scope to a case exactly like *Sanday's* case (1), but *Sanday's* case (1) is at least a striking illustration of what the clause aims at. I may add that I attach no importance to the use in the clause of the words " based upon." The clause might just as well have run " for loss of." The material and limiting words are the " insured voyage or adventure," which, as I

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(1) [1916] 1 A. C. 650.

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have explained, are not the same thing as the goods described in the policy. In my opinion the appeal in the *Minden* should be dismissed.

The next of the three test cases is that of the *Wangoni* as I shall call it. The assured (now respondent) was Middows, Ld., the underwriter (now appellant) was Robertson. That case is in the main analogous to that of the *Minden*, and what I have already said applies to it. There is, however, one important difference, besides the fact that the vessel succeeded in reaching Hamburg with the goods, namely, that there were suggestions or offers by or on behalf of the German government which might have enabled the assured to recover possession of the goods at a port other than the proper port of destination, subject to heavy payments and under onerous price and other conditions. This circumstance is relied on as showing that it was not unlikely that the goods would be recovered within the meaning of s. 60 of the Act, and thus excluding a claim for a constructive total loss, or, in the alternative, as preventing the assured from claiming for a total loss on the ground that they might have averted it by coming to terms with the German government and recovering the goods. The Court of Appeal have rejected both these contentions.

A statement of facts was agreed in this case as in the *Minden*. The goods consisted of a small parcel of triplex boards covered under a floating policy against war and marine risks, including also the Institute cargo clauses, war clauses and strike clauses. The parcel appears to have been valued at 24*l*. or thereabouts. It was shipped at Bremen in the German vessel *Wangoni* for carriage to Cape Town. The assured and the underwriters were British subjects. The *Wangoni* sailed from Bremen with the goods about the middle of August, 1939. Her first port of call was Cape Town, where, in the normal course, she would have arrived on or about September 12, 1939. But on August 29, 1939, she arrived at Las Palmas. She sailed from there for Vigo, Spain, on the same day, and arrived there on September 1, 1939. There she remained until February 10, 1940, at which date she sailed for Hamburg. She reached that port on March 5, 1940. The agreed facts include certain correspondence to which I shall later refer, together with the statement that the assured never paid the sums demanded in the correspondence at Vigo or Hamburg and did not take the goods on the terms offered at either port. The agreed statement is similar in other respects to that in the case of the *Minden*, and among other matters states that there was risk of capture on and after September 3, 1939, that there was an effective blockade of all German ports, that control had been taken by the German government of all German ships at all material times, and that the same orders as stated in the *Minden* case had been issued by that government to the master of the *Wangoni*. Hilbery J. has drawn certain inferences of fact, in particular that the master of the *Wangoni* had in his hands the orders of the German government before August 29, and that it was in obedience to those orders that he made the deviation to Las Palmas and then went to Vigo, intending, if war broke out, to wait at Vigo and thereafter to decide what course to pursue. Hilbery J. did not feel able to say with certainty that the master, before he left Vigo, had determined to take the goods back to Germany, though he is certain that he had so determined when, on February 10, 1940, he sailed from Vigo for Germany. But by reason of the correspondence to which I now refer, the learned judge rejected the conclusion that there was a constructive total loss on February 10, 1940. He disregarded the subsequent voyage to Hamburg and what happened there, because by the same reasoning as in the *Minden* case he held that when the vessel sailed from Vigo the subject-matter of the policy was gone and the goods were no longer at the underwriter's risk. The Court of Appeal in reversing that decision took the same view as in the *Minden* case, that the deviation or change of voyage did not terminate the insurance. Scott L.J. seems to put the constructive total loss which he found to have occurred on the ground that at the start of the deviations the goods were under restraint of princes, and that the German government, when their orders compelled the master to abandon the commercial voyage, took absolute and unconditional possession

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of the goods, and thereafter continuously deprived the respondents of their possession until the cargo reached the hands of the German government at Hamburg. He does not in terms discuss the correspondence and, I infer, was of opinion that the constructive total loss, which occured at latest on leaving Vigo, was merged in an actual total loss at Hamburg. MacKinnon L.J. was of opinion that at all material times it was certain that the cost of recovering the goods would exceed their value (their insured value being only about 24*l.*) when recovered. This appears to be correct, but of the two views so expressed I prefer that of Scott L.J. I may observe that the view of MacKinnon L.J. might be of little help towards elucidating principles in cases in which the insured value was substantial.

Apart from the correspondence, I think that when the *Wangoni* sailed from Vigo the position here is substantially the same as it was in the *Minden* when the latter vessel sailed from Rio. The correspondence, however, must now be considered. It starts with a letter of October 4, 1939, from certain brokers at Rotterdam, reporting that the *Wangoni*, owing to the international situation, had called at Vigo as a port of distress and offering to deliver the goods at Vigo on certain conditions, namely, payment of full freight (so far as not already paid) and discharging expenses, surrender of the endorsed and receipted bills of lading, and an additional payment of 25 per cent. of the value of the goods for calling at a port of distress. An irrevocable banker's guarantee of 100 per cent. of the value was also to be deposited, perhaps to secure against the contingency that the receipted original bills of lading were not available at Vigo, which might well be the case. But the whole proposal was only to be effective so far as discharge and delivery were possible, having regard to stowage and other difficulties. This was certainly a somewhat unattractive offer, even if a licence from the Treasury to deal with and make payments to an alien enemy was likely to be granted. No doubt, such licences were granted in some similar cases, and I shall assume, though I am far from satisfied, that it would have been granted in this case. The assured passed the letter on to the underwriters' brokers, who replied that the assured must act as if uninsured. What the assured did was to make certain inquiries, and eventually no more was heard of the proposition. This does not surprise me. I do not regard this correspondence as a reason for changing the opinion which I should have formed apart from it, namely, that there was a constructive total loss when the vessel left Vigo, if not before. I do not think that the correspondence rendered it any the less unlikely that the goods would be recovered. In a question of this sort it is necessary to examine all the circumstances. It is clear that the insured goods here were the goods embarked on an adventure for carriage to Cape Town. Recovery of the goods included recovery both of the goods and of the adventure. It is true that the disability of the carrying vessel to complete the voyage would not necessarily involve a loss (except a partial loss for expenses), so long as transhipment into another vessel was reasonably practicable, but I am not prepared to find that it was reasonably practicable in the present case. There is no specific evidence on the matter, but it is clear that this parcel of cargo was being held in the ship, after the outbreak of war, at Vigo, a neutral port. Assuming that delivery was obtainable from the *Wangoni* on the onerous terms of the contingent proposal, still it would be necessary, if the adventure was to be completed, to obtain space on a vessel bound to Cape Town, or if that was not possible, to England or a neutral port for a further transhipment to Cape Town. There would be heavy agency charges, heavy expenses of transhipment or transhipments, further freight and other expenses, in addition to the exorbitant payments demanded at Vigo. Besides all that, the proposition was uncertain and hypothetical, as well as exorbitant. I do not wonder that the assured, acting as prudent uninsured owners, did not entertain it. A goods owner placed in this position is only bound to act reasonably, whether his action is regarded as taken under the "sue and labour" clause in the policy or judged in the light of the similar duty stated in s. 78, sub-s. 4, of the Act, which is expressly limited to such measures as may be reasonable for averting or minimizing a loss.

There are several cases in which similar questions have been discussed. I shall only mention two. One is *Lozano* v. *Jansen* (1), where goods had been captured and condemned at St. Helena. Some portion, being perishable, was sold. The remainder, on an appeal to the Privy Council, was eventually released after two years. The assured had given notice of abandonment, and claimed in the action for a total loss. Lord Campbell said that the court, drawing an inference of fact from the evidence, thought that a prudent man, in the circumstances in which the assured found himself when he began the action, would not have taken possession of the goods at St. Helena and that he was entitled to recover as for a total loss. Another instance of the same type may be found in *Stringer's* case (2), where the assured could have recovered possession of the goods and prevented the sale, but only on terms that a prudent uninsured owner would not have adopted, and hence, it was held, a total loss was recoverable. I do not think that the correspondence at Vigo prejudicially affects the position of the claim of the assured in the present case. What is reasonable for the assured to do depends on the facts of the particular case. In the present case, I think that the conduct of the assured was reasonable. If, then, there was, as I am of opinion there was, a constructive total loss, at least when the ship left Vigo, I certainly do not think that the loss was in any way adeemed by the arrival of the *Wangoni* with the goods on board at Hamburg or by what happened there. Early in March, 1940, after her arrival, propositions for redelivering the goods, that is, the physical articles, there to the assured were made through a Dutch house, but before anything could be done Holland was invaded by the Germans and no more was heard about it. What I have said as to the Vigo correspondence applies with even greater force when the goods were in an enemy port. I think, indeed, that the deprivation of the goods by enemies was then total, and, if it were necessary to consider it, might properly be held to be an

(1) (1859) 2 E. & El. 160.
(2) L. R. 4 Q. B. 676.

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actual loss within s. 57 of the Act because the assured were irretrievably deprived of the goods.

The writ in this case was not issued until June 22, 1940, but the underwriters have disclaimed any reliance to the prejudice of the assured on delay, because the date of the writ resulted from negotiations and arrangements as to suitable test cases. The underwriters had in this as in the other cases waived any question as to notice of abandonment, and, accordingly, the notice may be notionally taken to have been made at whatever date is most advantageous to the assured, for instance, at the date of sailing from Vigo, or of arrival at Hamburg. But I think that at the date of the issue of the writ in this, as in the other two cases, there was an actual total loss, if that had been relied on. In my judgment this appeal should be dismissed.

The last of the three test cases deals with a parcel of Jarrah boards shipped in the *Halle*, which was a German vessel, by or on behalf of the respondents, who were British subjects, from Bunbury, Australia, to London, via the Cape of Good Hope. The goods were insured by the appellant and other British underwriters against war and marine risks. There was in this case also an agreed statement of facts, according to which the *Halle* sailed from Bunbury under a bill of lading dated July 27, 1939. She called at Durban on August 16, 1939, and passed the Cape of Good Hope on August 18, 1939. She is next heard of as having arrived at Bissao, Portuguese New Guinea, on September 6, 1939. She left there on October 13, 1939. On October 16, 1939, she was scuttled by those on board of her with her cargo in the presence of a French warship. In other respects the agreed statement of facts was substantially the same as that in the *Minden*. Hilbery J. did not feel able to infer that the master in going to Bissao was acting on the orders of the German government, but he did infer that in leaving Bissao he was sailing for Germany, and was, I infer, prepared to hold that there was then a constructive total loss. For reasons similar to those on which he acted in the *Minden* case, he held in this case also that the loss was not recoverable, because it was barred by the frustration clause. The Court of Appeal reversed his decision. I agree with them. I do not see any substantial difference between this case and the *Minden* except that it is not certain that the master when he put into Bissao, which I regard as a port of refuge, was acting under the orders of the German government. But, in any event, the deviation is, as Hilbery J. points out, excused by the liberties given by the bill of lading, so that the deviation was excused under s. 49 sub-s. 1 (*a*) of the Act, even if the master's act in putting into Bissao was voluntary, and, therefore, s. 45, sub-s. 1, of the Act did not apply. But having regard to modern facilities for wireless communications, I should be prepared to infer that the master put into Bissao because he had learned that war had broken out and felt that it was unsafe for the ship to proceed, so that on this footing s. 49, sub-s. 1 (*d*), applied. The policy in the *Halle* case is not precisely the same in its terms as that in the *Minden*, but I agree with MacKinnon L.J. that no part of it raises different considerations. As in the other cases, notice of abandonment has been waived by the underwriters. The writ was issued on June 14, 1940, but nothing adverse to the claim turns on that. Indeed, at that date the loss was an actual total loss by scuttling, which could be recovered as such as a loss by enemies, if there were not a recovery for a constructive total loss. I agree with the Court of Appeal, for substantially the same reasons as in the *Minden*, that the underwriter fails.

LORD PORTER. My Lords, these three appeals were heard together before your Lordships, as they were heard before Hilbery J., and the Court of Appeal. They raise not dissimilar legal questions and involve the consideration of not dissimilar facts, but there are certain differences of fact in each case and your Lordships were told that these three particular cases were chosen because of those differences. It was stated that underwriters had agreed with the assured to bring them before the court in order that as much guidance as possible might be obtained on the obligations which are incurred under the terms of a policy of insurance covering war and marine risks which contains what is known as the frustration clause. That clause is as follows: "Warranted free of "any claim based upon loss of, or frustration of, the "insured voyage or adventure caused by arrests restraints "or detainments of kings princes, peoples usurpers or "persons attempting to usurp power." It has now attained a common form and is identical in each of the policies sued on. Its history is well known. In *British and Foreign Marine Insurance Co., Ld.* v. *Samuel Sanday & Co.* (1), it was decided by your Lordships' House that where goods are insured under a voyage policy the frustration of the adventure by a peril insured against entitled the owner to recover as for a constructive total loss even though the goods remained uninjured in the hands of the carrier and at the owner's disposal. The so-called frustration clause was inserted to prevent this result since the underwriters were unwilling to cover such a loss, but, though this was the origin of the clause, it does not follow either that underwriters did not desire to reduce their liability more drastically, or that, even if they had no such wish, they have not in fact brought about a greater change than they contemplated.

In each of the three actions under consideration the insurance was on cargo carried in a German ship and that cargo was insured against both war and marine risks. The actual terms of the cover differed a little in form in the individual cases but no point turns on this divergence, nor did either party ultimately rely on it, though at one time the assured in the case of the *Wangoni* laid stress on the fact that they were covered against all risks. The material perils insured against are sufficiently described in the body of the policy in words which are contained in the standard form attached to the Marine Insurance Act, namely, "takings at "sea, arrests, restraints and detainments of all kings, princes "and people."

The facts in each case were agreed between the parties. No evidence was called, and underwriters, who were desirous of having a decision on the somewhat difficult questions involved, agreed to pay the expense incurred by both sides in the course of the litigation. Apart from those already stated the facts common to all three cases were: (1.) Both underwriters and assured are British subjects. The ships were German ships. (2.) On and after September 3, 1939, there was risk of capture whenever the ship was outside the territorial waters of any neutral state. (3.) As from September 3, 1939, there was an effective blockade of all German ports by the British and French naval forces who were further taking all possible steps to intercept and capture or destroy all German merchant vessels on the high seas. (4.) At all material times the German government, in furtherance of German war policy, had taken control of all German owned merchant shipping and had given orders to all such vessels and their masters to take refuge in neutral ports and, if possible, to return to Germany with their cargoes or, as a last resort, to scuttle their vessels.

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(1) [1916] 1 A. C. 650.

The facts peculiar to each of the cases may be tabulated as follows:—

1. *Minden*: (*a*) The goods of the assured were to be transported from Buenos Aires for Hong Kong/Shanghai option (including transhipment at Durban). (*b*) The *Minden* sailed from Buenos Aires with Durban as her first port of call with the insured goods on board shipped under a bill of lading dated August 16, 1939. On her normal voyage she would have reached Durban about September 15. (*c*) In fact, she put into Santos in Brazil on August 24, and left on the same day. On August 25, she arrived at Rio Janeiro, and, having sailed thence on September 6, was scuttled on September 29, by those on board off the Faroe Islands in the presence of a British warship and lost with all her cargo.

2. *Wangoni*: (*a*) The goods of the assured were to be transported from Bremen in Germany to Cape Town. (*b*) The *Wangoni* sailed from Bremen with Cape Town as her first port of call with the insured goods on board, shipped under a bill of lading dated August 12, 1939. On her usual voyage she would have reached Cape Town about September 12. (*c*) In fact, she put into Las Palmas on August 29, 1939, sailing

thence that day for Vigo, which she reached on September 1, and at which she remained until February 10, 1940. On that day she again put to sea, having cleared for Hamburg, which she was successful in reaching on March 5, 1940. In the case of this ship two tentative suggestions were made for restoring the goods to the British owners. The first was contained in a letter written by Messrs. Voight on October 4, 1939, and forwarded by Messrs. Müller on October 9, to the assured. In this letter it was stated that it was intended to place the goods at the disposal of the shippers "as far as it will be "possible to deliver them," under certain conditions, namely: (1.) Payment of full freight (so far as not yet paid) and discharging expenses. (2.) Against surrender of the full set of original bills of lading duly endorsed and receipted. (3.) Additional payment of 25 per cent. of the value of the goods for calling at a port of distress according to para. 635 of the German commercial code, and an irrevocable bankers' guarantee for 100 per cent. of the value of the goods. The German commercial code did not justify the claim to any such percentage for calling at a port of distress. The letter contained two further stipulations, namely, that (i.) delivery could only be made so far as discharge and delivery should be possible with regard to the stowage and eventual other difficulties. (ii.) All charges for restowage to be for account of the goods for which restowing is necessary, and asked for information whether the shippers wished to receive the goods at Vigo. The letter was shown to the underwriters who endorsed it, "act as if uninsured," and when the assured requested the brokers to "act in the usual way," the latter replied that the war insurance was finished as under the frustration clause the vessel put into a port of distress. No further communication passed between the parties or the representatives of the German owners while the vessel was at Vigo, but on February 14, 1940, as soon as it was ascertained that she had cleared and sailed from Vigo for Hamburg the assured put forward a claim for a total loss and on March 6 informed the brokers that the ship had reached Hamburg. Further negotiations took place while the ship was at that port.

On March 27 the London Chamber of Commerce wrote to the assured stating that the cargo had not been seized by the German government up to March 21, and apparently they did not intend to do so in the near future. The letter continued by saying that it was understood that the goods would be released in accordance with the conditions of the bills of lading and the stipulations of the German government subject to: (1.) Payment of full freight (if not paid in advance). (2.) Presentation of the full set of original bills of lading duly endorsed. (3.) Payment of a contribution to the expenses of the port of refuge of 13 per cent. c.i.f. value. Quay dues and warehouse rents accruing after discharge to be for the account of the goods. The Chamber pointed out that permission must be obtained from the Trading with the Enemy Branch of the Board of Trade before endeavouring to secure release of the cargo through a neutral intermediary and in a later letter suggested Messrs. Müller of Rotterdam as a suitable intermediary. By April 27 permission to endeavour to obtain the release of the goods through Messrs. Müller on the terms stated was granted and the assured inquired of the Trade Commissioner for South Africa if the goods could be admitted into their original destination. The assured were referred to Pretoria and there the matter rested when on May 10 the German forces invaded Holland.

3. The *Halle*. (*a*) The goods of the assured were to be transported from Bunbury in Australia to London via the Cape of Good Hope. (*b*) The ship sailed from Bunbury with the insured goods on board, shipped under bills of lading dated July 27, 1939, called at Durban on August 16, and passed the Cape of Good Hope on August 18. On a normal voyage she would have arrived in London about September 16. (*c*) In fact, she arrived at Bissao, in Portuguese Guinea, on September 6, sailed thence on October 13, and on October 16, was scuttled by those on board in the presence of a French warship and lost with all her cargo.

In all three cases the policies contained the usual clause holding the assured covered in case of deviation or change of voyage. In each case it was agreed that the court might draw inferences of fact. The facts in the first and last cases are almost identical. It is true that in the case of the *Minden* a very wide deviation clause is to be found in the bill of lading and that "all liberties as per contract of affreightment" are included in the policy, whereas in the case of the *Halle*, though the bill of lading contains a war clause giving "the carrier "the rights and liberties as set out in the war risk clause "incorporated" with it. I cannot find in the charter party which it incorporates or in the bill of lading itself any such liberties. I will refer to the clause appertaining to the *Minden* later on, but, in the view which I take, that difference is immaterial, as is the fact that, whereas in the one case the ship reached her port of refuge, whether Santos or Rio be so regarded, before the outbreak of war, in the other Bissao was not entered until after hostilities had begun. The case of the *Wangoni* gives rise to some further considerations since she succeeded in running the blockade and reaching her home port though only after a voyage of twenty-five days.

The statements of fact are not entirely explicit, but perhaps no greater accuracy could be obtained. I interpret them as meaning that at some unspecified period before the outbreak of war the German government had issued orders which as good citizens the masters were bound to obey. Those orders were that if war became imminent refuge was to be taken in a neutral port, and at the master's discretion, either before or after hostilities began, the ships were to return to Germany or to be scuttled if they could avoid capture in no other way. I infer that in each case the masters carried out these instructions to the best of their ability. In pursuance of them the *Minden* put in first at Santos and then at Rio, creeping as near as she could to Germany so as to be ready for the final dash if war came. The *Wangoni* turned back to Las Palmas and later to Vigo for the same purpose, and the *Halle*, whose voyage in the normal course brought her nearer to Europe, put into Bissao as a port of refuge and put out again in an endeavour to reach a German port. In the cases of the *Minden* and the *Halle* the masters at some period, not later in the one instance than the moment of sailing from Rio and in the other from Bissao in pursuance of the orders of the German government, abandoned their contractual voyages and endeavoured to take their ships and cargo to a German port, running what risk there might be of having to scuttle their vessels to avoid capture. Similarly, in the case of the *Wangoni* the master, after putting into two ports of refuge, sailed for Germany as a result of his government's commands.

It was admitted in each case that, had it not been for the frustration clause, there would have been a constructive total loss by loss of the adventure, but it was said on behalf of the underwriter that there was no constructive total loss of the goods themselves because the voyage insured had come to an end before loss and because at any time at which the cover still subsisted the actual total loss of the subject-matter insured neither appeared to be unavoidable nor could it not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. In particular, it was said that it was not unlikely that the assured could recover his goods or that the cost of recovery would exceed their value when recovered. The conditions of s. 60 of the Marine Insurance Act, 1906, necessary to constitute a constructive total loss had, therefore, not been fulfilled.

The argument as I understood it was as follows: At some time before the outbreak of war, and it matters not when, the several masters had received the orders of the German government. They had thereupon either abandoned, or at any rate deviated from or changed, the insured voyage. Thereupon, the cargo carried in them ceased to be covered by insurance because the goods were not protected except at a time when they were being carried on the voyage insured. It is true that by that abandonment, deviation or change of voyage undertaken at the command of the German government there was a loss of the adventure, but there was no loss of the goods, or, if there was a loss of the goods, the same loss constituted a loss of the adventure, and, therefore, the assured could not recover owing to the operation of the frustration clause in the policies. I stress that aspect of the argument

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which asserts that the goods are only protected while on the insured voyage to show that it was not argued before your Lordships' House that only the adventure is insured and not the goods apart from the adventure.

It is true that a loss which occurs after the insured voyage (whatever it may be) is terminated is irrecoverable, but it is, I think, obviously wrong to assert that any loss of the goods which also frustrates the adventure is excepted from the cover given. Certainly any total loss of the goods insured, whether actual or constructive, must put an end to the adventure—they are lost and cannot be carried further, but a construction of the frustration clause which deprives the assured of any indemnity in case of a total loss by restraint of princes is not in my view necessitated by the wording of the clause. The goods may be lost, or, alternatively, the adventure may be lost without the assured being deprived of the goods themselves, and apart from the frustration clause the assured can recover in either case. The cover is twofold. If authority be required for such a proposition it is only necessary to refer to one of the cases cited by the learned judge of first instance and to repeat the wording which he quoted. In *Sanday's* case (1) in the Court of Appeal Lord Reading C.J. says: "but it is *not only the goods* that are the subject-matter "of the insurance." The italics are mine. Bray J. says (2): "It is not true that in a policy of this kind the goods *only* "are insured." Again the italics are mine. In the same case, *British and Foreign Marine Insurance Co., Ld.* v. *Samuel Sanday & Co.* (3), in your Lordships' House, Lord Loreburn expresses a similar view when he states "The words of this policy have "for generations been understood and held by judges to "designate not merely the goods but also the adventure." I have dealt with this point though it was not argued before your Lordships because in the view of the Court of Appeal Hilbery J. decided against the assured on the ground that any war peril which frustrated the adventure, and, therefore, every total loss so caused, was excepted from the cover given by reason of the terms of the frustration clause. The learned judge in the course of his judgment says: "The "policy being a marine insurance policy the subject-matter "of the insurance is the adventure of the goods on the voyage. "The goods are not insured apart from the voyage. It is "the voyaging with the goods or the goods upon the voyage "which is the subject-matter of the contract." The expression is not very clear, and in criticizing it MacKinnon L.J. says (1): "The subject-matter of the contract is, of course, the goods and "they are insured against loss or damage by insured perils. "But even if the goods are not so lost or damaged there is an "*additional* insurance against the loss of their voyage. The "learned judge considers this to be not an *additional* "risk but an essential part of it in every case." I would accept the learned Lord Justice's language subject to the qualification, which indeed he clearly recognizes, that the goods are covered only while on the insured voyage just as chattels ashore insured in a particular place are covered only while in that place. The learned judge may have meant only to emphasize this fact, though I feel some difficulty in so interpreting him when he says a little later on in the course of his judgment: "The same restraint, therefore, which the "plaintiffs [i.e. the assured] say caused a loss of the goods, "caused a loss of the goods through a loss of the adventure, "and in those circumstances the plaintiffs do not show a loss "through a peril insured without also establishing that the "loss was also due to a peril excepted by their 'warranted free' "claim." Whatever the meaning of those observations may be it is, I think, plain that there may be a loss, total or partial, actual or constructive, of the goods by war risk which is not within the exception. The goods are lost and it is unnecessary for the assured to rely on the loss of the adventure. Underwriters do not succeed in proving a loss within the exception merely by showing that the adventure has been lost. A total loss of goods must always have that result. They must go further and show that the claim of the assured follows and is based on the loss of the adventure, not merely that the loss of

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(1) [1915] 2 K. B. 781, 811.
(2) Ibid. 781, 832.
(3) [1916] 1 A. C. 650, 657.

(1) [1941] 1 K. B. 250.

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the adventure is a consequence of the loss of the goods, even though that loss be due to combatant seizure.

A more forcible argument, however, remains to be considered. Is it true to say that the insurance had come to an end before the loss claimed in each case occurred? It is said on behalf of the underwriters that, when the individual master concerned left the course of his voyage by putting into a port of refuge or turning back towards Germany, he thereby abandoned the insured voyage or deviated from or changed it, and that, in whichever of these ways his act be regarded, the goods ceased to be carried on the insured voyage and the cover lapsed, or, at any rate, the underwriters were entitled to a substantial additional premium under the "Held covered" clause.

In dealing with this argument it is desirable to treat each case separately. In the policy on the cargo carried in the *Minden*, cl. 12 of the Clauses for Shipments from South America contains the words: "Including all liberties as per "contract of affreightment." That contract is to be found in the bill of lading, to which is attached a war clause giving the widest possible liberty to the carrier in the event of the imminence or existence of war, including the liberty to comply with any orders or directions as to routes, ports of call, stoppages or destinations or otherwise however given by any government, and anything so done is not to be deemed a deviation. Under this liberty I should regard the alteration of route to Santos and Rio as constituting part of the contractual voyage and as not being a deviation. But, in truth, it is not necessary for the assured to rely on this clause inasmuch as that deviation is excused under s. 49 of the Marine Insurance Act, 1906, as being caused by circumstances beyond the control of the master and his employer. The section follows the rule in force from early times as is perhaps best exemplified by the quotation from Roccus, vol. lii., liii., cited in 2 Emerigon, c. 13, s. 15, p. 94, which is quoted in Arnould's Law of Marine Insurance, in s. 425: "Si iter mutaverit "magister ex aliqua justa et necessaria causa, puta ex causa "refectionis navis, vel ad evitandam maris tempestatem, vel "ne incideret in hostibus in istis casibus, mutato itinere, "tenetur assecurator." The master's act was both necessitated by moral force and reasonably necessary for the safety of the ship which, unless such steps were taken, might well fall into the hands of the British navy. But it is said that in addition to or instead of deviating the master at some stage changed his voyage. I do not think that he did so in the sense in which those words are used in the Marine Insurance Act, 1906. Change of voyage is now defined in s. 45 of the Act as occurring when after the commencement of the risk the destination of the ship is voluntarily changed from the destination contemplated by the policy. There was no voluntary change in the case of the *Minden*. The master was not acting on his own initiative, but on orders which (to use the words of Lord Ellenborough in *Phelps* v. *Auldjo* (1), morally as a good subject he ought not to have resisted. The same considerations apply to the *Halle*. As I have said, I cannot find any authorization for deviating or changing the voyage in the contract of affreightment, but, as the master's action was caused by circumstances beyond his and his employer's control and was involuntary, the deviation was excusable and the voyage was not changed within the provisions of s. 45 of the Act. Nor do I see any difference in this respect in the case of the *Wangoni*. The full terms of the bill of lading are not in evidence and I can find no liberty to deviate or change the voyage, but the master's action was brought about by orders identical with those on which the other two masters acted.

These considerations establish in my view that in none of the shipments was there either deviation or change of voyage on which the underwriters could rely as discharging them from liability. In each instance, as I have indicated, the policies contained the held covered clause, the wording of which, so far as is material, runs: "Held covered at a "premium to be arranged in case of deviation or change of "voyage." The underwriters contended that, even if they failed in their main contention, they were entitled to at least a very substantial additional premium under the terms of this clause. As, in my view, the deviation is excusable and there has been no change of voyage, no extra premium is payable.

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(1) 2 Camp. 350.

There remains to be considered whether there was at any time a loss, for which the assured can recover, by a peril insured against. At some time each of the masters abandoned the insured voyage and set his vessel's course for Germany or the bottom of the sea according to circumstances. At that moment the insured voyage came to an end, but it does not follow that at that moment the underwriters ceased to have any further liability for the goods which they had covered.

In the first place, was there a loss to the assured of their goods by restraint of princes ? So far as the *Minden* and the *Halle* are concerned, both the judge of first instance and the Court of Appeal held that there was, and I agree with them. Nor do I think that it matters at what precise moment of time the abandonment of the voyage is placed. Whether it be when the master first decided to put into a port of refuge and thence make the attempt to reach Germany, or when he reached the first or second port of refuge, or when he set sail from that port appears to me to be immaterial. At some time he set out for a German port with the goods on board in pursuance of his government's orders, and at that moment the owner was deprived of his goods at a time when no change of voyage had taken place and there had only been an excusable deviation.

It is unnecessary to repeat the views expressed in *Robertson* v. *Petros M. Nomikos, Ld.* (1), with the reasoning of which all your Lordships who were present at the hearing agreed. In accordance with that reasoning, if the assured has been deprived of his goods and it is unlikely that he can recover them there is a constructive total loss. Was it unlikely in these two cases ? The learned judge and the Court of Appeal thought it was. To judge by the after-event the inference was justified. However, one must not judge by the result, but from the probabilities as they would have appeared to a reasonable assured at the moment when he knew of his loss and could have given notice

(1) [1939] A. C. 371, 382, 391.

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of abandonment—had notice been required. I say "had "notice been required" because, though want of notice was pleaded, the point was given up, and, indeed, it could not successfully have been taken since the first the assured heard of their loss was of the scuttling of the ships concerned. If that be the moment at which the likelihood or unlikelihood of recovery would have to be determined the assured succeed in their claim obviously because the loss they sustained had then become actual and total. This of itself might constitute a ground on which the assured could recover in these two cases. From the time the master broke off from his contractual voyage to return to Germany, whether that be when he made up his mind to abandon the voyage (as Arnould seemed to think from his observations in s. 380), or whether it be when that purpose was manifested—to use the word found in the Marine Insurance Act, 1906, s. 45, sub-s. 2—or whether the true inference is that the moment to be chosen is when the ships left their last port of refuge, the owners were deprived of their goods which thenceforward remained in the control of the German government and in the grip of their restraint until they were lost by the master's action in scuttling his ship. For this purpose it is immaterial that they had previously been seized. That seizure would or would not amount to a constructive total loss according to whether the assured was or was not likely to recover them and what expense he would incur in doing so. But that loss, whether partial only or constructive and total, was by the scuttling converted into an actual total loss while the goods were still covered by the policy.

If it was desired to rely on the original seizure as constituting a constructive total loss of the goods notice of abandonment of the goods, had notice been insisted on, would have been necessary, but, whether he had or is to be regarded as having given notice of abandonment or not, the assured could, if an actual total loss followed that which was partial or constructive only, neglect the latter and recover for the former. The principle is well known and one illustration may suffice. In *Mellish* v. *Andrews* (1), goods carried in a ship detained by the

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(1) 15 East. 13.

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Swedish government might have been the subject of a claim for a constructive total loss if notice of abandonment had been given in time, but notice was held to have been given too late and the defendant underwriters obtained a verdict on that account. The goods, however, had afterwards been unladen and seized by the same government, and on appeal a new trial was ordered on the ground that the subsequent seizure constituted an absolute total loss for which the assured was entitled to recover. But this aspect of the case has not been developed. Let me, therefore, assume that the question is: Was the owner unlikely to recover them when once the German government's orders were acted on? At that moment I think it was much more likely that they would be lost than that they would survive, and I regard the escape of the *Wangoni* as exceedingly fortunate. In my judgment, they were more likely to go to the bottom of the sea than to reach Germany, and, even if they reached Germany, the assured was unlikely to recover them.

If this be the true inference, then, when once the master sailed for a German port, the goods were a constructive total loss at a moment when they were still being carried in the ship mentioned and on the voyage insured in the policy. It is true that the adventure was put an end to by that loss, but the adventure was only lost through the loss of the goods. the goods were not lost by reason of the loss of the adventure,

On these grounds, I should hold that the frustration clause had no application to the circumstances of these cases. It was meant to deal, and I think its wording appropriately deals, with a case where the assured, if he is to recover at all, must rely on the loss of the adventure and cannot rely on the loss of the goods.

For my own part I should take this view even if the wording of the clause had been "frustration of the adventure by "restraint of princes always excepted." But my view is strengthened when I find the phrase used is "warranted free "of any claim based upon loss of . . . . the . . . . adventure." No doubt, it can be said that "based upon" bears the same meaning as "founded upon," but whichever word is used it is

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the claim which must be based or founded upon frustration in order to exonerate the underwriters, and "claim" to my mind in that collocation suggests the form of claim adopted by the assured, not a possible claim which he might have made had he so desired.

I cannot distinguish the case of the *Wangoni* in essence from that of the other two ships save in one respect. I am willing to assume it to be a possible inference that the master did not abandon the voyage or intend to hold the goods for the German government at any rate until he left Vigo in February, though I should myself draw the inference that he had already determined to slip away to Germany with the goods on board as soon as an opportunity offered, and that his suggestion of discharge at Vigo was only made to produce the impression that he intended to stay there or in case his attempt to escape proved unsuccessful. Assuming, however, that his suggestion was genuinely made, what was it worth? In every respect it was tentative: "As far as it will be possible to deliver "them." "We must, however, draw attention to the fact "that delivery can only be made so far as discharge and "delivery is possible with regard to the stowage and other "difficulties." "All charges for restowing to be for account "of the goods for which restowing is necessary." This wording coupled with a suggestion of a heavy additional expenditure and an irrevocable bank guarantee is not such as to induce the belief that the goods could ever have been recovered by their owners at Vigo, or, if they could, that the expense would not exceed their value. Your Lordships were told that the parties were anxious that, in considering the probability of recovering the insured property from this ship at Vigo at an expense less than their value, the fact that there were other British goods of large value on board should be borne in mind. If this argument is to be considered at all, and I doubt if it is legitimate to do so, it would, I think, also be pertinent to know whether any of those other goods were recovered or if they, like those belonging to the assured, were carried on to Germany. In default of further information, I should myself regard them all as unlikely to be

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recovered even up to the time the vessel left Vigo—but as to those not the subject-matter of the present action I cannot judge of the expense involved. In this view it is immaterial to consider what happened at Hamburg. The assured made a claim for a total loss as soon as they heard the vessel had left for that port. But, even if the later events are to be considered, I should be prepared to hold that up to the end it was unlikely that the assured would recover the goods. It would have taken time to effect their release and arrange, if arrangement were possible, for their shipment to South Africa. Events in Europe were not such as to lead the assured to think that the possibility of negotiation on the terms permitted would continue after the invasion of Holland on May 10, 1940, and it is to be remembered that negotiation through Messrs. Müller of Rotterdam alone was permitted. To begin all over again in the altered conditions was, I think, unlikely to result in the release of the goods, even if the British government would still permit negotiations to continue.

I conclude, therefore, that the insured goods carried in all three ships were constructively lost at the moment when the masters determined to return to Germany and acted on that determination. It is not necessary to decide when that moment was. At latest it was when each ship left her last port of refuge, and at that time the goods were still covered by the respective policies.

I agree in substance with the Court of Appeal, and would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Ince, Roscoe, Wilson & Glover.*

Solicitors for respondents: *Slaughter & May; W. A. Crump & Son.*

[PRIVY COUNCIL.]

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Jan. 19.

GUARDIAN TRUST AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED . . . . } APPELLANTS;

AND

PUBLIC TRUSTEE OF NEW ZEALAND . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Executor—Payment of legacies—Notice of intention to apply for revocation of probate—Probate subsequently recalled—Liability of executor—Statutory notice to creditors "and others"—Inapplicable—Effect of grant of probate—The Trustee Act, No. 200 *of* 1908, *s.* 74.

Executors of a will, having obtained probate, with notice of the fact that next of kin intended or contemplated applying for revocation of the grant of probate on the ground of want of testamentary capacity, paid out pecuniary legacies purporting to have been given by the will to persons and institutions not entitled to share in the estate on an intestacy:—

Held, that they were liable to the deceased's estate for the sums so paid when probate was afterwards recalled, since the case fell within the equitable principle that, if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A., he will be liable to A. if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded.

An order of the court obtained by the executors under s. 74 of the Trustee Act, 1908, of New Zealand, before distribution, requiring creditors "and others" to send in their claims against the estate afforded the executors no protection, since notices issued pursuant to the order made under that section did not affect persons whose claim was that the executor or administrator had no right to administer the estate.

Newton v. *Sherry* (1876) 1 C. P. D. 246, referred to.

Further, the executors were not relieved from liability on the ground that by reason of the grant of probate they were acting under an order of the court, for a grant does not actually order the grantee to do anything, and the executors were under no obligation to the court to pay the legacies. Even the oath of an executor in New Zealand only binds him to pay the legacies "so far as . . . . the law binds," and in this case the law did not so bind the executors.

Hewson v. *Shelley* [1914] 2 Ch. 13, referred to.

Judgment of the Court of Appeal of New Zealand affirmed.

**Present :* VISCOUNT SIMON L.C., LORD THANKERTON, LORD ROMER, and CLAUSON L.J.

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Appeal (No. 54 of 1940) from a judgment of the Court of Appeal of New Zealand (July 14, 1939) which, by a majority, had reversed a judgment of Northcroft J. in the Supreme Court (July 28, 1938).

Miss Elizabeth Smith, of Christchurch, New Zealand, died on July 9, 1935, having made a will on June 8, 1934, whereby she appointed as her executors the appellants to whom probate in common form was granted on July 19, 1935. On April 3, 1936, proceedings were instituted by two of the next of kin of the deceased for revocation of probate on the ground of her want of testamentary capacity. The proceedings were successful, and by order of the court, dated December 17, 1936, probate was recalled. The deceased had made no other will, and on April 19, 1937, letters of administration were granted to the respondent. In the meantime, the executors had paid out of Miss Smith's estate sums amounting in all to 8450*l.* in respect of pecuniary legacies which she had purported to give by her will to certain persons and institutions not being persons entitled to share in her estate on an intestacy. The question was whether, before paying the legacies, the appellants had such notice of the intention of next of kin to apply for revocation of the grant of probate as to make them liable to refund the 8450*l.* to the respondent as administrator of Miss Smith's estate. The respondent instituted the action to recover that sum on December 22, 1937. The appellants pleaded (inter alia) that the payments were made bona fide on the probate granted which had not then been revoked.

Northcroft J. gave judgment for the appellants, but his decision was reversed by the Court of Appeal of New Zealand (Myers C.J., Smith and Fair JJ., Ostler J. dissenting).

1941. Nov. 24, 27, 28. *Wallington K.C.*, *G. O. Slade* and *Michael Bowles* for the appellants. The action was brought on the ground that the title of the administrator related back to the death, and that, therefore, there was an obligation on the appellants, when probate was revoked, to account to the respondent for the estate which came into their hands. The onus is on the respondent to prove that the appellants in fact

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paid away otherwise than in good faith, and a question arises as to the meaning of good faith: *Tharpe* v. *Stallwood* (1). Good faith may mean honesty in a man's mind, or it may be, as some of the judges below put it, that absence of good faith will be proved if the executor with some sufficient notice were to disregard it and still make the payments. By this is meant such a notice as ought to affect the mind of a reasonable business man to prevent him from making the payment which he would otherwise have made. It is submitted that the duty to exercise good faith in this case comes under the first head—honesty of mind and purpose in making the payment. Assuming, however, that that view is wrong, then, quite apart from the trial judge's finding of honesty and good faith, the appellants have proved that there was nothing in what had occurred before the payment to affect them with such notice as ought to have prevented them from distributing. The court must have regard to the circumstances of the case. The appellants thought that they had good ground for believing that the will could not be successfully attacked, and that as nothing definite had been done up to the time they paid the legacies it was not a matter to which they need pay any attention. They felt that they were charged with the payment of the legacies under the will, and though they might have waited until the expiration of the executor's year before doing so, they saw no reason why they should do so, and on those grounds it became their duty to pay. There appears to be no authority which covers this case. The matter is quite open for decision, and the application of the equitable proposition as to notice is open to consideration. The matter must be regarded at the time when the acts of the appellants were done. The appellants were then the executors and trustees under the will, and had obligations under it. The next of kin had no right to any of the property, but only the right to go to the court to endeavour to establish their rights, if any. When the appellants as executors paid the legacies they did not infringe any existing right of anybody. That distinguishes this case from the ordinary case to which the general equitable principle is applicable, for in such a case the notice has been received in respect of a person whose right has been infringed. A notice of a mere claim is not sufficient to affect a man of business unless it is a claim which then exists. The respondent, when once proceedings had been begun for revocation, could have claimed an injunction to restrain the appellants from dealing with the estate. Had the action to revoke probate failed, nobody could have said that the appellants were wrong in paying out the legacies when they did. If the question of good faith is independent entirely of the result of the proceedings for revocation, the matter must rest on the state of the appellants' mind. [Reference was made to *In the Goods of Chamberlain* (1), which was referred to in *Williams* v. *Evans* (2).] The trial judge, having considered all the facts, including this question of notice, and seen the witnesses and considered their evidence in relation to the documents, came to the conclusion that the appellants' conduct had been actuated by good faith throughout, and the Court of Appeal ought not to have reversed him. [Reference was also made to Tristram and Coote's Probate Practice, 18th ed., p. 31.]

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(1) (1843) 5 M. & Gr. 760.

G. O. Slade following. If the executor of a will of which probate is recalled is absolutely liable to the subsequent personal representative for dispositions of the estate adverse to the next of kin before the date of recall, then not only has there never been any defence to this action, but an action might lie for damages for conversion, and, if the executor is absolutely liable, there is no difference in law between the liability of an executor whether he has acted on probate in common form or in solemn form. It is submitted, however, that the basis on which a qualification is placed on the appellants' liability is that they have acted under a de facto order of the court, the grant of probate, and are, therefore, not liable, because the order is at most voidable, and so long as it is not avoided they are protected by it. It is conceded that when not acting under an order of the court no one can safely disregard information, from whatever source, if of such

(1) (1867) L. R. 1 P. & D. 316.

(2) [1911] P. 175.

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a nature that a reasonable man or man of business would act on it: Snell's Principles of Equity, 20th ed., pp. 38–39; *Lloyd* v. *Banks* (1). In considering notice when one is acting under an order of the court, however, the legal position is entirely different. All that law and equity then require is honesty in the common law sense. Of the five judges who have dealt with this case at least two have found that the appellants acted reasonably. With the exception of the Canadian case of *Randall* v. *Delap* (2), there appears to be no case of an executor who has disposed of part of the estate and probate has been subsequently recalled. The decision in *Randall's* case (2) appears to be in favour of the appellants. There are a number of cases like *Allen* v. *Dundas* (3), where there were payments to an executor, but they are not on all fours.

Blanco White K.C. and *J. H. Stamp* for the respondent were not called on.

1942. Jan. 19. The judgment of their Lordships was delivered by LORD ROMER. The question for determination is whether, having regard to the circumstances in which the payments were made, and which are hereinafter described, the executors were liable to refund the 8450*l.* to the respondent as administrator of Miss Smith's estate. The history of the case may be said to have begun with the death of Miss Smith's unmarried brother in 1923. The appellants were his executors, and in this way got into touch with Miss Smith, who had benefited to the extent of some 20,000*l.* under his will. The brother and sister had lived in the same house at Christchurch, where various nephews and nieces would seem to have stayed with them during his lifetime, but after his death their visits gradually became less frequent, and Miss Smith had lived alone for a number of years preceding her death. She was a woman without any knowledge of, or aptitude for, business, but Mr. Harris, who was the appellants' manager at Christchurch, and had frequently seen her in connection with the winding up of her brother's affairs, had kept in touch with her

(1) (1868) L. R. 3 Ch. App. 488.

(2) (1885) 18 N. S. R. (6 R. & G.) 106.

(3) (1789) 3 T. R. 125.

and was able to advise her to some extent about her own. But she was a person who would easily fall a victim to the blandishments of the fraternity of fraudulent share pushers, and in 1933 Mr. Harris discovered that she was in their toils. He came to her assistance, and appears for a time to have succeeded in his efforts on her behalf. It was plain to him, however, that she needed to be protected from herself, and he persuaded her to execute a power of attorney in favour of his employers, the appellants. This did not, however, succeed altogether in its object. Mr. Harris found that Miss Smith was still being victimized, and he reported the circumstances to Mr. Ward, the general manager of the appellants, whose headquarters are at Auckland. Correspondence between these two gentlemen ensued, and in the end, and with the concurrence of certain of her relatives, a petition under the Aged and Infirm Persons Protection Act, 1912, was presented by the appellants asking that a protection order might be made appointing the appellants managers of the estate of the lady who, at this time, was of the age of 79 or thereabouts. On December 14, 1933, a protection order as asked by the petition was made, and on the same day Mr. Harris wrote to Mr. Ward a letter as follows: "I was pleased to wire you to-day that "we have come to the end of our troubles in connection with "Miss Smith's affairs by getting the court order . . . . Miss "Smith called on me yesterday and I am pleased to say that "I was able, without any trouble, to get her to see the wisdom "of the court proceedings being completed. She is now quite "resigned to allowing us to handle everything and I only hope "that we will be able to do something towards restoring her "finances." Subsequent events showed that this hope was abundantly justified, but Mr. Harris was sadly mistaken in thinking that he and the appellants had come to the end of their troubles in connection with the old lady's affairs, for only about three months after the making of the protection order Mr. Harris conceived an idea that led eventually to their being involved in a great deal of trouble, which culminated in the present proceedings. The idea was that Miss Smith should make a will, and he informed Mr. Ward of the idea in a letter to that gentleman of March 16, 1934. "I will now "make an endeavour," he wrote, "to get Miss Smith to a "proper state of mind for the making of a will." He certainly got her to make a will, but it was beyond his powers to get her into a proper state of mind to do so, and as has already been said, probate of the will was eventually recalled on the ground that at the time of making it the lady had not the requisite testamentary capacity. It is unnecessary to detail the steps taken by Mr. Harris to procure the making of the will. They were carefully considered by Northcroft J., who tried the action for the recall of the probate, and the following extracts from his judgment in that case show the view that he took of Mr. Harris's activities: "It is proper to say that he does "appear in this matter, as in all others relating to Miss Smith, "to have been moved by a genuine desire to assist one whose "infirmities had enlisted his sympathies." And a little later: "I am satisfied that although his action was mistaken, and "arose from inexperience, Mr. Harris acted genuinely in the "best interests of the testatrix as he judged them." These views of his found practical expression in his order that the costs of the present appellants of those proceedings should be paid out of the estate as between solicitor and client. And there their Lordships are content to leave it. Nor is it necessary to state in any detail the provisions of the will. It is sufficient to say that Miss Smith gave pecuniary legacies amounting to a little over 12,000*l.* to various persons and institutions among whom were included several persons entitled to a share in her estate on an intestacy, and bequeathed the residue of her estate to the appellants on certain charitable trusts. As has already been stated, she appointed the appellants her executors.

The events that took place after her death must, however, be stated in some detail. On the very same day as that on which the appellants obtained probate, namely, on July 19, 1935, Mr. Harris wrote to Mr. Ward as follows: "I have "heard it rumoured that some of the relations are not too "pleased with the will and there has been some talk of "contesting it, but on reflection I am sure that they will

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"realize their folly." On the next day he is found writing to a Mr. Thomas, a solicitor whom he had employed in connection with the preparation of the will, in the following terms: "I had an informal talk with McKay a solicitor of "the office of Stanton of this city and he mentioned that "Miss Pyne, one of the beneficiaries of Miss Smith, had "consulted them as regards the will. Apparently she is getting "in touch with the other relatives to see if they will join in "taking steps to have the will upset . . . . The question of "testamentary capacity was mentioned, but I ridiculed any "suggestion that she was lacking in this respect." On July 25, 1935, Mr. Ward, writing to Mr. Harris, said in connection with the question of the will being contested: "I "understand that Miss Pyne is pressing the matter somewhat "and the solicitors are now looking into the matter of "testamentary capacity. Personally I think that they would "have great difficulty in upsetting it on this account." On August 9, 1935, Mr. Harris wrote to Mr. Ward that he understood that Miss Pyne was not taking any action as regards upsetting the will, but that a Mrs. Dando and a Mrs. Cookson were interesting themselves in the matter. It was this Mrs. Cookson who was subsequently one of the plaintiffs in the action brought for revocation of the grant of probate. Now, however firmly Mr. Ward and Mr. Harris may have believed that Miss Smith was possessed of full testamentary capacity when she executed the will, these letters show that after her death they had been given ample warning that others who were interested in the matter took a different view. Having regard to the lady's history it is plain that such a warning could not be disregarded, and that, until the question of testamentary capacity had been settled in favour of the will, payment by the appellants of the legacies could only be made at their peril. That this was fully appreciated by Mr. Ward and the directors of the appellants is made manifest by two letters written by Mr. Ward to Mr. Harris on October 15 and 16, 1935, respectively. In the first of these Mr. Ward writes: "The solicitor who is acting for some of the beneficiaries "mentioned to me casually the other night that they propose "to take proceedings with a view to upsetting the will. I "am rather inclined to think that those moving in the matter "are the Dandos, but I have no confirmation of this. I have "also heard from another source that some of the beneficiaries "were proposing to take proceedings on the grounds that the "Guardian Company had practically coerced this woman into "making her will. In view of the possibility of proceedings "we consider it would be unwise to make any payment to the "legatees, because there is just the chance if the will was "upset that they may not turn out to be the actual next-of-"kin who are entitled and if payment were made of the legacies "inside the executor's year we would possibly be under some "liability." In the second letter paras. (2.) and (3.) are as follows : "(2.) With regard to a possible distribution, the board "have decided that in view of information we have received "indirectly it is anticipated that proceedings will be instituted "to attack the will. (3.) Consequently, it would be inadvisable "for us to pay the legacies in case the provisions of the will are "upset and if this is so, of course, there would be an intestacy ". . . ." These letters suggest that Mr. Ward and his directors may not have been unmindful of what befell another executor who paid the legacies given by a will that was afterwards declared to be invalid, and whose sad story was told by him to Sam Weller when they were fellow inmates of the Fleet prison. (All of which may be found reported in Chapter XLIV. of the Pickwick Papers.) But, however this may be, it may well be asked in view of the letters why the appellants nevertheless paid all the legacies. The answer to that question is to be found in paras. (4.) and (5.) of the letter last quoted. They are as follows : " (4.) Therefore, under the circumstances, the "board considered it advisable that an order under s. 74 of "'The Trustee Act' should be obtained and, after expiration "of the time allowed by the court, if no further claims are made, "the legacies should be paid out. (5.) We should be pleased "if you would instruct the estate solicitors to prepare the "necessary petition for execution by the board as soon as "possible."

The section of the Trustee Act, 1908, to which the letter refers is in these terms: "(1.) Where an executor or an administrator has given such notices as a judge, upon application "by petition to him, directs for creditors and others to send "in to the executors or administrators their claims against "the estate of the testator or intestate, such executors or "administrators, at the expiration of the time named in such "notices or the last of the said notices for sending in such "claims, may distribute the assets of the testator or intestate, "or any part thereof, amongst the parties entitled thereto, "having regard to the claims of which such executors or "administrators have then notice, and shall not be liable for "the assets or any part thereof so distributed to any person "of whose claims such executors or administrators have not "had notice at the time of distribution of the said assets, or a "part thereof, as the case may be. (2.) But nothing in this "Act shall prejudice the right of any creditor or claimant to "follow the assets or any part thereof into the hands of the "persons who have received the same respectively."

How anyone could have persuaded himself that this section was going to enable the appellants to pay the legacies with safety it is difficult to understand. It would appear, however, that Mr. Ward and the board reasoned among themselves somewhat as follows: "In the case of *Newton* v. *Sherry* (1) "the Court of Appeal in England decided that the words 'and "'others' in s. 29 of Lord St. Leonards Act, which corresponded "with s. 74 of our Trustee Act, included next of kin. If, "therefore, we issue notices under s. 74 and at the expiration "of the time named in such notices no claims have been sent "in by any of the next of kin, we can safely pay the legacies." But such reasoning is based on a complete misapprehension of the object and effect of the section and of the decision in *Newton* v. *Sherry* (1). That (as one might have guessed) was a case of an intestacy. In such a case it is, of course, essential that the administrator should be protected from the claims of unknown next of kin as much as from the claims of unknown creditors. The decision has no bearing on a case like the present, except for the observations made by Lindley J. as to the object and effect of s. 29 of Lord St. Leonards Act. As regards the object, he said it was to enable the executor or administrator to "administer the estate without the expense "and delay of a Chancery suit" (1). As to its effect he said this: "If proper advertisements are issued for 'creditors and "'others' . . . . to come in and substantiate their claims, "the executor or administrator is not liable for parting with "the assets in a due course of administration amongst those "of whose claims he has notice" (1). It is plain from this, as indeed it is from the language of the section itself, that the only persons who are to be affected by the notices are those whose claims against the estate are to be met by the executor or administrator as the case may be in a due course of administration, and not persons whose claims are that the executor or administrator has no right to administer the estate at all. It is probable that neither Mr. Ward nor any one of his directors addressed his mind to the question of what the appellants would have done if in pursuance of the notices one of the next of kin had sent in a claim that the will was invalid. If that had happened and the construction put on the section by Mr. Ward and his directors were to prevail, the appellants at the expiration of the time named in the notice would have been entitled, in the words of the section, to distribute the assets of Miss Smith among the parties entitled thereto having regard to the claims of which they then had notice. A construction that can lead to so absurd a result is plainly wrong. The petition was nevertheless presented to the court, and an order was made thereon on December 10, 1935. In due course notices were published as directed by the order, requiring all "creditors and other persons" having claims against the estate of Miss Smith to send in such claims to the appellants "together with written particulars thereof" on or before January 31, 1936. The notices stated that after such date the executors proposed to distribute the assets among the parties entitled thereto having regard to the claims of which they should have then received notice.

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(1) (1876) 1 C. P. D. 246.

As might have been expected, none of the next of kin sent in a claim in pursuance of the notices, but the solicitors acting for some of them (Messrs. O'Donnell and Cleary) had seen the notices, and on December 18, 1935, wrote to Mr. Harris as follows : "We have been consulted by certain of the next of kin "of the late Miss Elizabeth Smith with a view of taking pro-"ceedings for the revocation of the probate granted to your "company in July last, on the ground of the lack of testamentary "capacity on the part of the testatrix. At present certain "enquiries are being made and counsel's opinion is being taken, "but it will not be available until after the legal vacation. "Our attention has been drawn to an advertisement in the "Christchurch 'Press' on the 14th inst. as to your intention "to distribute the estate after January 31 next. At the "present time we desire merely to notify you that the question "of taking proceedings for the revocation of probate is under "consideration and that a definite decision will be arrived at "in the matter before the end of January next, and as soon "as this is done we shall advise you of the course it is proposed "to take." A formal acknowledgment of the receipt of this letter was sent to Messrs. O'Donnell and Cleary, but otherwise no notice was taken of it by the appellants who, on various dates between February 14 and 20, 1936, and without any further communication to those gentlemen, proceeded to send out cheques in payment of the legacies the subject-matter of the present appeal. On February 20, 1936, Messrs. O'Donnell and Cleary wrote a further letter to Mr. Harris stating that they had by then received instructions to take proceedings for the revocation of the probate granted to the appellants, and that such proceedings would be issued shortly. They were informed in reply that "distribution in the estate has been "made."

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(1) 1 C. P. D. 258.

The proceedings referred to having been taken with the result which has already been stated, the present action was instituted on December 22, 1937, by the respondent against the appellants to recover for the benefit of the next of kin the 8450*l.* and interest. By his amended statement of claim the respondent alleged, among other things, that at the time or times when the cheques for this sum were issued the appellants

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had notice (1.) that certain of the next of kin of the deceased claimed that at the date of the execution by her of the will she was not of testamentary capacity; (2.) that certain of the next of kin intended to take, or contemplated taking, proceedings on that ground for the revocation of the probate granted to the appellants, and had consulted solicitors with a view to the institution of the said proceedings. That the appellants did have such notice in fact is plain from what has already been stated. The question to be decided is whether they are by reason thereof liable to make good the said sum to Miss Smith's estate.

There does not appear to be any statute in force in New Zealand that governs the case. It falls, therefore, to be decided in accordance with the well established principles of equity. One of those principles is that if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded. This principle has, indeed, been recognized by the New Zealand legislature in dealing with cases which are closely akin to the present one. By s. 26 of the Administration Act, 1908, it is provided that an administrator acting under the provisions of the Act who makes any payment or does any act bona fide under or in pursuance of the administration shall not be liable for the sums so paid or the acts so done by reason of the existence of any will of the deceased owner (where the administrator acts under letters of administration without will annexed), or of any will other than that of which administration has been granted (where he acts under probate or under letters of administration with will annexed), but then follow these words: "if the existence of such first-mentioned will or such "other will, as the case may be, was unknown to him at the "time of making such payment or doing such act." It follows that, if he knew of such a will at the time, he would be liable for making the payment or doing the act. In the present case, apart altogether from what they had previously heard, the information conveyed to the appellants by the letter of

December 18, 1935, from Messrs. O'Donnell and Cleary was of such a nature that no reasonable man should have disregarded it. The appellants should on its receipt at least have applied to the court for directions, and, if the facts and circumstances had been placed before it, the court would certainly have refused to sanction any payment to the legatees for the time being, even though January 31, 1936, had passed without anything further having been heard from those solicitors. It is, indeed, quite plain that the appellants themselves would not have paid the legacies in disregard of the information contained in the letter had they not misunderstood the meaning and effect of s. 74 of the Trustee Act, 1908. As it is, the section and their proceedings under it can avail them nothing, and they have no effective answer to the claim of the respondent.

The action was, nevertheless, dismissed by Northcroft J. because he was satisfied that the appellants at all material times believed that Miss Smith had testamentary capacity, and that they had acted throughout with perfect honesty. But with all respect to the learned judge, the question is not whether the appellants acted honestly in disregarding the information which they had received. A trustee who has received information of a charge on the interest of his cestui que trust in favour of a third party is not entitled to disregard it merely because he honestly believes the charge to be invalid. Nor can an executor who has information of the existence of a later will act in disregard of such information merely because he honestly believes that his testator was not at the time of making it of testamentary capacity. In all such cases, as in the present one, the question is whether the person acting in a fiduciary capacity has had notice of the claim, and not whether he formed a favourable or unfavourable view as to the prospect of the claim succeeding. In their Lordships' opinion the appellants had ample notice of the claims of the next of kin in the present case before they paid the legacies, and it follows that in their opinion the Court of Appeal were right in reversing the order of Northcroft J. In the course of his judgment in that court, after a review of the facts of the case, Myers C.J. said that he could come to no other

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conclusion than that the payments to the legatees were made with knowledge and notice on the part of the respondents of facts and circumstances which should have made it plain to any ordinary, reasonable and prudent man of business that the payments should not have been made. With this conclusion of the learned Chief Justice their Lordships find themselves in complete agreement.

One further point should be mentioned. It was urged on behalf of the appellants that the equitable principle to which their Lordships have referred has no application to the present case inasmuch as the appellants by reason of the grant to them of probate were acting under the order of the court. They were, so it was argued, under an obligation to the court to pay the legacies. But there was in truth no such obligation. For although a grant of probate is an order of the court (see *Hewson* v. *Shelley* (1)) it does not, actually, order the grantee to do anything. In New Zealand it runs, so far as material for the present purpose, as follows: "Be it known "to all men that on this day of in the "year the last will and testament of "deceased, a copy of which is hereunto annexed, has been "exhibited read and proved before and "administration of the estate effects and credits of the deceased "has been and is hereby granted to the executor "in the said will and testament named, being first sworn "faithfully to execute the said will by paying the debts and "legacies of the deceased as far as the property will extend "and the law binds . . . ." Even the oath, therefore, only binds the executor to pay the legacies "so far as . . . . the "law binds." In the present case the law did not so bind.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondent's costs of the appeal must be paid by the appellants.

Solicitors for appellants: *Stafford Clark & Co.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

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(1) [1914] 2 Ch. 13.

[HOUSE OF LORDS.]

H. L. (E.)* CHARLES OSENTON AND COMPANY . APPELLANTS;

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March 6, 7;

May 9.

AND

JOHNSTON . . . . RESPONDENT.

Practice—Reference—Judge's order referring action—Case involving prolonged examination of documents or scientific or local investigation—Question of alleged negligence by professional persons—Discretion of judge — Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 89 (*b*)—*Administration of Justice Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 55), *s.* 1, *sub-s.* 1.

The appellants, a firm of estate agents and surveyors, were instructed to prepare a scheme for the lay out of an estate belonging to the respondent, and proceeded to do so. Later, the respondent, alleging that the appellants had acted negligently and without sufficient regard to his interests, sued the appellants claiming damages for breach of contract and negligence. The respondent applied for an order under s. 89 of the Judicature Act, 1925, that the action should be tried by an official referee on the ground that a prolonged examination of documents or a scientific or local investigation would be necessary, and that order was made:—

Held, that as the professional reputation of the appellants was involved, that question should not be left to the final decision without appeal of an official referee but should be tried before the normal tribunal of a High Court judge with a jury.

Decision of the Court of Appeal [1940] 2 K. B. 123 reversed.

APPEAL from a decision of the Court of Appeal.

The respondent, the plaintiff in the action, having on March 24, 1936, contracted to purchase a property known as Tilehouse Estate, in the borough of Guildford, and having also contracted to purchase an adjoining property known as Stoughton Farm Estate, made an agreement with the appellants, a firm of estate agents and surveyors at Guildford, under which they gave instructions to them to prepare a scheme for the lay out of the estates. The appellants accepted those instructions, and thereafter until about May, 1938, proceeded with the development of the properties.

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* *Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD WRIGHT, and LORD PORTER.

On October 23, 1939, the respondent sued the appellants claiming damages for breach of contract and negligence, alleging that under the agreement it was their duty to act with due skill and diligence, to make all proper inquiries and obtain all necessary information, and to take all necessary steps to forward his interests in and about the development of the properties. He further alleged that in breach of that duty the appellants acted negligently and without sufficient or any regard to the respondent's interests, the negligence and disregard of the respondent's interests alleged being in effect as follows: failure to acquaint themselves with the levels of the property; advising a system of cesspool drainage and failing to consider whether that system could be avoided by an alternative means of pumping sewage into a public sewer; that in consequence the respondent to his detriment was forced to enter into an arrangement with the local authority in regard to temporary cesspool drainage, and the provision by the local authority at some future time and at some cost to the respondent, of main drainage facilities; that owing to the appellants' action in regard to those matters the development scheme was delayed; that the appellants provided for laying certain sewers which either could not be laid at all or could only be laid with disadvantage to the respondent; that their plans did not provide, as they should have done, for securing the greatest number of houses permitted on the property by the Housing Acts; that the appellants arranged for laying certain sewers which, as they knew, or ought to have known, would not be and were not passed by the local authority, and had ultimately to be removed; and failed to take certain steps necessary for enabling a proper system of surface drainage to be installed.

The appellants denied that they had been in any way unskilful or negligent.

On behalf of the respondent an application was made for an order under s. 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, that the action should be tried before an official referee on the ground that it required a prolonged examination of documents or a scientific or local investigation.

The master, on the application of the respondent, made an order that the action should be referred to the official referee. The appellants appealed and the Court of Appeal (Clauson L.J. dissenting) dismissed the appeal but gave leave to appeal to the House of Lords.

Gilbert Beyfus K.C. and *Montague Berryman* for the appellants. We submit that there was no jurisdiction to refer this case to an official referee, but even if there were jurisdiction so to refer it, that jurisdiction should not be exercised inasmuch as the effect of such an order would be to deprive the parties of the right of appeal on questions of fact. The order made is particularly oppressive in such a case as this where allegations of negligence are made against professional persons.

F. A. Sellers K.C. and *D. A. Scott Cairns* (for *J. P. Ashworth*, absent on war service) for the respondent. Sect. 89 of the Judicature Act, 1925, could properly be invoked for the question involved being referred to an official referee, as was so considered by the master and by Tucker J. in chambers, it being clearly within their discretion so to order. Various plans had to be considered and a considerable number of documents. There was thus certainly ample material before the judge to justify his order. In *Ward* v. *Pilley* (1) the Court of Appeal held that any question of account which may be referred compulsorily to a master under s. 3 of the Common Law Procedure Act, 1854, may also be referred compulsorily to an official referee under s. 57 of the Judicature Act, 1873; and in *Ormerod* v. *Todmorden Joint Stock Mill Co., Ld.* (2), the Court of Appeal said that while it had jurisdiction to review the discretion of the judge it would not do so except in a strong case in which it clearly thought that the judge had wrongly exercised his discretion and that an injustice had thereby been done by his order. If this appeal is allowed it will or may involve a very serious limitation of the number of cases that can be referred to an official referee. No statutory restriction is imposed on the class of cases that may be referred.

(1) (1880) 5 Q. B. D. 427.

(2) (1882) 8 Q. B. D. 664.

The House took time for consideration.

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1941. May 9. VISCOUNT SIMON L.C. My Lords, the question raised on this appeal turns on the interpretation and proper application of paragraph (*b*) of s. 89 of the Supreme Court of Judicature (Consolidation) Act, 1925. That section is in the following terms: "In any cause or matter, other "than a criminal proceeding by the Crown—(*a*) If all the "parties interested who are not under disability consent; "or (*b*) If the cause or matter requires any prolonged examin"ation of documents or any scientific or local investigation "which cannot in the opinion of the court or a judge con"veniently be made before a jury or conducted by the court "through its other ordinary officers; or (*c*) If the question in "dispute consists wholly or in part of matters of account the "court or a judge may at any time order the whole cause "or matter, or any question or issue of fact arising therein to "be tried before a special referee or arbitrator respectively "agreed on by the parties, or before an official referee or "officer of the court."

Under this section it is plain that two matters may arise. The first is the ambit of the jurisdiction which it confers upon the master or judge to make an order on an opposed application transferring the trial to an official referee. The second is the question of the considerations to be borne in mind, when jurisdiction to make the order exists, before the master or judge decides to exercise his discretion by making the order.

The appellants contend that the present action is one to which s. 89 has no application at all. They further contend that if there is any jurisdiction in the present case to make the order of transfer, the discretion to make it has not been properly exercised and that the order on that ground ought not to be made. These two contentions must be examined in turn.

First, as to the scope of para. (*b*). Several questions of interpretation arising under the paragraph were discussed in the course of the hearing before this House, and, though it is not necessary to form a final conclusion on all of them in order to decide this appeal, it is, I think, convenient, as we are dealing with a rule of procedure which is so frequently brought into play, to mention each of the points raised.

(*a*) Does the relative clause "which cannot in the opinion of "the court or a judge conveniently be made" etc. qualify both of the alternatives mentioned in para. (*b*), or does it only qualify the second of them, namely, "any scientific or local "investigation"? In other words, does jurisdiction to make the order arise if the cause or matter requires "any prolonged "examination of documents" without qualification, or is this test satisfied only when such prolonged examination cannot conveniently be made by the alternative methods mentioned? Having regard to the earlier history of this provision, and in particular to the contrast between the language of the repealed s. 57 of the Supreme Court of Judicature Act, 1873, and of the existing s. 89 of the Act of 1925, I have formed the opinion that the relative clause qualifies both limbs of the paragraph. Sect. 57 of the Act of 1873 authorized transfer to an official referee in any "cause or matter requiring any prolonged exam-"ination of documents or accounts, or any scientific or local "investigation which cannot, in the opinion of the court or a "judge, conveniently be made before a jury, or conducted by "the court through its other ordinary officers." The Act of 1925 dealt separately with the case in which the dispute consists wholly or in part of matters of account and put this case in a separate para. (*c*), without adding the test of convenience. But it left the "prolonged examination of docu-"ments" to be grouped in the same paragraph with "any "scientific or local investigation," and it follows, I think, that the requirement of a prolonged examination of documents is not enough to give jurisdiction, unless the test of convenience is also satisfied.

(*b*) What is the meaning of the final words in para. (*b*)—"through its other ordinary officers"? It is to be observed that the paragraph does not in express terms raise the question whether the matters to be examined or investigated could conveniently be dealt with by a judge without a jury. It is, I think, clear that the "other officers" of the court are not the High Court judges themselves; the reference must be to masters or registrars and similar functionaries. But even though trial by a judge without a jury is not expressly referred to in para. (*b*), it is plain that in exercising the discretion conferred by that paragraph, the master or judge must consider whether hearing by a judge without a jury is not the proper course. One can imagine a case in which the probable length of the inquiry would be so great that if the case is put in the non-jury list, it would be unlikely to secure the continuous attention of a judge, who would in due course be going on circuit, or perhaps would so block the disposal of other causes as to embarrass the due administration of justice. In considering whether to transfer a case to the official referee where all parties do not consent, the master or judge must always have fully in mind, and give due weight to, the alternative of trial by a judge alone.

(*c*) What do the words "scientific or local investigation" mean? In many cases, the need for local trial is appropriately met by fixing the place of trial at assizes, but a very long investigation is, for practical reasons, not suited to this treatment, whereas an official referee can establish himself in the part of the country which is most convenient for the hearing, and carry the case to its conclusion, if necessary, even though it lasts a long time. And there may be other reasons requiring a prolonged local investigation which would justify an order of transfer, e.g., if in a long case a large number of witnesses from the same locality is likely to be called. As for "scientific "investigation," I do not consider that a sufficient reason for transfer would be found merely because technical questions are involved. A judge is just as fit to deal with scientific evidence as an official referee. For reasons which will immediately appear, it is not necessary in the present appeal for me to fix the limits of application of this phrase, and it would only hamper the working of the clause if in this, or in other respects, the House were to lay down precise limits. It may be that "investigation" is a word wide enough to cover something more than evidence given at the hearing—for

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instance, experiments conducted in the presence of the judge of fact may be included.

The appellants, as I have said, contend that the present case does not come within the section at all. The master had before him nothing but the pleadings, and an admission that "a number of plans will have to be laid before the court." They disputed that evidence about levels, or the pros and cons of cesspool drainage, would satisfy the requirement of "scientific investigation." Clauson L.J., in his very powerful dissenting judgment, agreed with the appellants' contention. He said: "From the pleadings I should infer that the case "would involve the consideration of detailed plans of the "locus, and of outlay and drainage plans, possibly some expert "evidence as to the recognized way of dealing with such "drainage problems as arose, and a careful consideration of "the bearing on the matter of the rights and powers of the "local authority in regard to such matters, and possibly also "in regard to the Housing Acts. Without further evidence I "should, speaking for myself, be quite unable to hold that the "plaintiff (who supports the order for reference) had discharged "the onus which lay on him of establishing that the action "required a prolonged examination of documents or a scientific "or local investigation which could not conveniently be con-"ducted by the court through its ordinary officers. That "the action might well last several days and would thus be "likely to hamper the progress of the non-jury list I can well "believe. But, if the matter had rested with me, I should be "prepared to hold that the plaintiff had failed to establish the "existence of the conditions required by the relevant provisions "of the Acts before the matter can be compulsorily referred to an "official referee, and I should on that ground allow the appeal."

If the decision in this appeal depended solely upon the question whether Clauson L.J.'s pronouncement on this aspect of the case should be upheld, I should hesitate before I could reject the learned Lord Justice's conclusion, for, while no hard and fast line can be drawn so as to provide an automatic test for the application of the section, I do not myself see in the pleadings and in the admission as to plans sufficient prospect of prolonged examination of documents, or of scientific investigation, to lay a foundation for compulsory transfer. But it is most undesirable to limit, by unnecessary rulings, the reasonable ambit of the work which official referees undertake and discharge so greatly to the public benefit and to the advantage of the due administration of justice. And it is unnecessary in this appeal to be so precise, because there is a second ground urged by the appellants, which, taken with the flimsiness of the material on which the order is founded, convinces me that the order should be reversed.

This second ground is as to the exercise of the discretion to make the order, assuming there was bare jurisdiction to do so. The appellants strenuously opposed a reference of the cause to an official referee because their professional reputation is at stake in the action, and s. 1 of the Administration of Justice Act, 1932, changes the previous law by providing that no decision of an official referee shall be called in question by appeal or otherwise, except in the case of a decision on a point of law. The respondent's counsel pointed out, with force and justice, that the impossibility of an appeal on fact from the official referee did not at all diminish the jurisdiction to transfer an action in a proper case to an official referee. That is true; but I cannot doubt that the circumstance is one to be weighed in an application for transfer when the other party objects on this ground in a case involving more than financial considerations. The allegations here are not of incidental negligence by servants for whom the defendants must be regarded as responsible: what is involved is the professional reputation of the partners themselves. It has often been recognized that where a charge of fraud is involved, the transfer of the decision from the High Court to an arbitrator appointed under the terms of the contract, may properly be resisted: *Russell* v. *Russell* (1). Similarly, the demand that, where fraud of a party is alleged, the case should be heard in the ordinary way rather than be transferred to an official referee has been acceded to: *Leigh* v. *Brooks* (2), unless indeed the case is of such a character that it cannot be properly dealt

(1) (1880) 14 Ch. D. 471.

(2) (1877) 5 Ch. D. 592.

with without a prolonged examination of documents by this latter means: *Hoch* v. *Boor* (1). Negligence falls far short of fraud, but nevertheless if the appellants press the objection (as they do) based on the Administration of Justice Act, 1932, I hold that the objection is relevant to the exercise of discretion under s. 89 and ought, wherever reasonably possible, to be given full weight.

There remains the question whether, assuming that in the circumstances of this case Tucker J. had jurisdiction to make the order of reference, his conclusion must stand on the ground that it was reached in the exercise of his discretion and that the exercise of such discretion should not be interfered with on appeal. So the respondent contends, while the appellants urge that, even if the discretion to make the order existed, it was wrongly exercised in view of the gravity of the charges made against them, of the impossibility of appeal from an official referee's finding of fact, and in view of the practicability of the case being tried before a judge without a jury. The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. This matter was elaborately discussed in the decision of this House in *Evans* v. *Bartlam* (2), where the proposition was stated by my noble and learned friend, Lord Wright, as follows (3): "It is clear that the Court of Appeal

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(1) (1880) 43 L. T. 425.

(2) [1937] A. C. 473.

(3) Ibid. 486.

"should not interfere with the discretion of a judge acting "within his jurisdiction unless the court is clearly satisfied "that he was wrong. But the court is not entitled simply "to say that if the judge had jurisdiction and had all the facts "before him, the Court of Appeal cannot review his order "unless he is shown to have applied a wrong principle. The "court must if necessary examine anew the relevant facts "and circumstances in order to exercise a discretion by way "of review which may reverse or vary the order. Otherwise "in interlocutory matters the judge might be regarded as "independent of supervision. Yet an interlocutory order of the "judge may often be of decisive importance on the final issue "of the case, and one which requires a careful examination by "the Court of Appeal. Thus in *Gardner* v. *Jay* (1), Bowen L.J. "in discussing the discretion of the judge as regards mode of "trial says: 'That discretion, like other judicial discretions, "' must be exercised according to common sense and according "' to justice, and if there is a miscarriage in the exercise of "' it it will be reviewed.'"

In all the circumstances, I reach the conclusion that if there were jurisdiction to make this order, the making of it was not a legitimate exercise of discretion, which of course would not be disturbed on appeal, but was a wrongful exercise of the discretion which it is the duty of this House to correct.

I move that this appeal be allowed with costs here and below.

VISCOUNT MAUGHAM. My Lords, the question before your Lordships is whether the Court of Appeal was right in affirming the order of Tucker J. ordering the action to be referred to one of the official referees of the Supreme Court. This question requires the consideration, first, of the circumstances in which the order for reference was made, and secondly, of the question whether the case is one of a somewhat exceptional kind in which the Court of Appeal ought to have interfered with the order of the learned judge though made in the exercise of his discretion and should have set aside the order.

The order for reference was made under s. 89 (*b*) of the

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(1) (1885) 29 Ch. D. 50, 58.

Supreme Court of Judicature (Consolidation) Act, 1925, which I need not repeat. The court or a judge is thereby given a discretionary power in certain defined circumstances to order the whole cause or matter, or any question or issue of fact arising in it, to be tried before an official referee. The relevant circumstance in this case—which is to be found in category (*b*)—is that the cause required prolonged examination of documents or some scientific or local investigation "which "cannot in the opinion of the court or a judge conveniently "be made before a jury or conducted by the court through "its other ordinary officers." On the precise meaning of this somewhat cryptic section I cannot usefully add anything to that which has fallen from the Lord Chancellor with which I completely agree. I have, however, had considerable doubt whether the respondent established that the conditions of the category (*b*) in the section were satisfied. High Court judges so constantly deal with cases involving no more prolonged examination of documents nor any further local examination than the present case is likely to entail that I am inclined to the view that all that was established in this case was that the hearing was likely to be rather a long one; and that alone is not a sufficient ground for referring the cause. However this may be, and while my own opinion on this point is that which Clauson L.J. has forcibly expressed, I am content to dispose of the matter on the footing that the conditions required by the section had been established by a narrow margin.

It is unfortunate that we have not had the advantage of receiving any information as to the reasons which guided Tucker J. in affirming the decision of the experienced master; and the Court of Appeal was in the same position. There was considerable difference of opinion in that court, and the matter was twice argued. The appeal was finally dismissed; but Clauson L.J. differed; and Singleton J. stated very clearly that he would not have made the order, but did not think that the discretion of the learned judge ought to be interfered with. Slesser L.J. himself expressed no personal view as to the order being right, but thought it was not a case for interfering with the exercise of discretion by Tucker J.

My Lords, in my view this is a somewhat special case, and I think that it ought not to be regarded as an encouragement to litigants to appeal in ordinary cases from such an order as we are now considering. Your Lordships have carefully perused the pleadings, from which the fact emerges that the case is one which involves serious allegations of personal negligence, and in particular of gross dereliction of professional duty, against a firm of estate agents and surveyors. The vital importance of this circumstance arises from the fact that since the Administration of Justice Act, 1932, came into force no decision of an official referee can be called in question by appeal or otherwise except on a point of law. If the official referee should decide against the appellants, unless indeed he should wrongly decide a point of law, they will be helpless in the matter, and may have their professional reputation and prospects completely ruined.

Nothing is further from my thoughts than to suggest that the official referees now in office are likely to decide wrongly. But there is a well known Latin adage, to be found I think in most Latin grammars, which truly states that every man is liable to err. The maxim is applicable to all persons and even to the most eminent of judges. Whatever may have been the reasons of the legislature in so greatly curtailing in the year 1932 the right of appeal from an official referee, and I do not profess to appreciate them, it must be remembered, as the authorities show, that the question whether a cause should be referred is one which must be decided in the light of justice, equity and common sense as between the parties. A strong case should be made before litigants against whom serious charges of personal negligence have been alleged are deprived by order of a right to have the case tried by a High Court judge with the very important consequence of depriving them of their right to appeal. I fully agree with what Clauson L.J. has said on this point. In a case so important in its possible consequences to the appellants as the one we have before us, and trial before a High Court judge not presenting serious difficulties, they ought not in my opinion to be deprived of the right to correct or to endeavour to correct by an appeal an error into which the referee (like any other judge) may have fallen.

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My Lords, I think there are sufficient grounds in this case for thinking that due weight was not given by the learned judge to this aspect of the case; for if it had been I feel that his decision would not have been in favour of making the order of reference. It is true that the matter was one for the exercise of his discretion; but with all respect I have come to the conclusion that his discretion was exercised without giving sufficient consideration to the point that I have mentioned, and that the present order may result in injustice being done.

The judgments delivered in your lordships' House in *Evans* v. *Bartlam* (1)—and I would refer particularly to that of my noble and learned friend Lord Wright—are sufficient to show that this House will not be departing in any degree from the rule or the practice in regard to appeals in cases where discretionary jurisdiction is involved by allowing the present appeal.

I agree with the motion proposed from the Woolsack.

LORD WRIGHT. My Lords, this appeal raises a question which is always embarrassing to an appellate court—namely, whether it should reverse an order made by the judge on a matter of discretion. But there is in general a statutory right of appeal from such orders, and, as Brett L.J. wisely observed as long ago as 1882 in *Ormerod* v. *Todmorden Joint Stock Mill Co., Ld.* (2): "If we have the jurisdiction to "review it seems to me that the legislature places the "discretion in this court on an appeal in the place of the "discretion of the learned judge, who, this court thinks, "has not exercised his discretion rightly. This court lays "down for itself the rule, which I think is the right one, that "it will not exercise its own discretion unless it thinks the "case is perfectly clear." This House, in *Evans* v. *Bartlam* (1), had to consider the problem, and reached a similar conclusion. In the Court of Appeal in that case the opinion had been expressed that the court had no power to interfere with the exercise of the judge's discretion unless the court thought

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(1) [1937] A. C. 473.

(2) 8 Q. B. D. 664, 679.

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he had acted upon some wrong principle of law. Lord Atkin thus dealt with the matter (1): " Appellate jurisdiction is "always statutory; there is in the statute no restriction upon "the jurisdiction of the Court of Appeal; and while the "appellate court in the exercise of its appellate power is "no doubt entirely justified in saying that normally it will "not interfere with the exercise of the judge's discretion "except on grounds of law, yet if it sees that on other grounds "the decision will result in injustice being done it has both "the power and the duty to remedy it." I think, however, it would be a mistaken interpretation of the noble and learned Lord's opinion to attach undue emphasis to the words " normally " and " will " in the passage I have quoted. No doubt the appellate tribunal has a simpler task if it sees that the judge has proceeded on a wrong view of the law, but Lord Atkin was clearly not intending to limit the appellate jurisdiction to cases of error in law by the judge. Indeed, strictly speaking, there is in such cases no true exercise of discretion. Nor did Lord Atkin use the word " will " as involving certainty, or even what is called moral certainty. The context, I think, shows that all he meant was " may," that is, that there is a reasonable danger of injustice. This view of Lord Atkin's meaning seems to me to be justified by his opinion as a whole and the opinions delivered by the other Lords in that Appeal.

In the present case, though the order of the learned judge agreed with that of the master, there was considerable difference of opinion in the Court of Appeal. The appeal twice came before the court, as your Lordships were informed. First before Luxmoore and Goddard L.JJ. As they appeared likely to differ, the appeal was again argued before a Court differently constituted, composed of Slesser and Clauson L.JJ., and Singleton J. The appeal was then dismissed, Clauson L.J. dissenting, but leave was given by the court to appeal to this House.

It is clear from this difference of opinion that the case is one of difficulty. It is also one of great importance to the

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(1) [1937] A. C. 480.

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appellants, who are estate agents and surveyors and are personally charged in the action with professional neglect and incompetence. The order appealed from has referred the trial of the action to an official referee. Without any reflection on the capacity of the official referees, the appellants not unnaturally feel that a case of such importance and gravity entitles them to a trial before a judge of the High Court. But they rely on an even more serious objection. There is now no appeal from the findings of fact of an official referee. The appeal is limited by the Administration of Justice Act, 1932, s. 1, sub-s. 1 (*a*) (6.) to questions of law. The appellants claim that this is in itself a sufficient ground why the discretionary power, if it exists, to refer the case to an official referee should not be exercised. But they also contend that the jurisdiction to refer does not exist in this case, because the conditions postulated by s. 89 of the Supreme Court of Judicature Act, 1925, which confer on the court the discretion to refer, were not satisfied. In particular, they say that the case did not, within the meaning of the section, require any prolonged investigation of documents, nor did it require any scientific or local investigation which could not in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its ordinary officers. This contention involves the interpretation of the words of the section; in particular of the words "scientific" or "local" investigation. I think that all the words are used in a somewhat vague and general sense. They are not terms of art nor are they to be too strictly construed. "Prolonged" involves practical questions of degree. "Documents" is a very general word. "Scientific investigation" is in my opinion wide enough to cover questions of the practical applications of science, though it imports a narrower idea than the words "technical" or "expert." It would not in general include a large proportion of technical or expert evidence, such as that of a handwriting expert or an expert stevedore. But especially in modern days it would cover a wide range of expert evidence, if that is based on scientific knowledge, such as that of medical or surgical experts,

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engineering experts of many types or classes, sanitary or chemical experts. I give these as mere instances of a term which I should construe widely. " Local " again is a vague term, primarily no doubt applying to investigation of actual local conditions on the spot, but apt to cover any investigation of local conditions. Then the word " conveniently " is a word which affords a large scope for discretion.

This House has before it the same materials as were before the learned judge. The respondent alleged that he was developing a property near Guildford and instructed the appellants in their professional capacity to prepare a scheme for the lay out of the property as a housing estate. He charged them in the statement of claim with negligence in various respects, in particular with failure to obtain a complete grid of levels of the property, which he alleged was essential to prepare a drainage scheme; with negligence in recommending a scheme of cesspool drainage instead of making use of public sewers by means of pumping plant; there were also complaints as to negligence in the preparation of plans, with consequent expense and delay; the appellants were also charged with a failure in making the best use of the land so as to get into it the full number of houses which could be erected upon it. These samples sufficiently indicate the general nature of the claim, which prima facie appears to involve some examination of plans, investigation of levels and local conditions, and expert evidence, some of which might be of a scientific character. Clauson L.J., in the Court of Appeal, was not satisfied that the respondent had sufficiently established the conditions postulated by the section. The onus was, he said, on the respondent to show with particularity what were the documents, how they required prolonged investigation, what was the nature of the local or scientific investigation. I feel the force of this criticism but I do not desire to decide the appeal on that point. In view of what I regard as the wide range and vague meaning of the conditions stated in the section, I am not prepared to hold that there was in this case no material on which the judge could exercise his discretion, though the material was both scanty and doubtful.

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That the material was both scanty and doubtful might in itself be in some circumstances a sufficient ground for reviewing the exercise by the judge of the discretion, which is a judicial discretion not to be exercised without adequate reasons, but I am not sure that in this case it could be said merely on that ground that the judge was clearly wrong. There is here however an objection which, to my mind, is decisive. The claim is one which charges professional men with very serious negligence or incompetence or both, in their professional capacity. It is true that even charges of fraud, and, a fortiori, of professional neglect, have been referred in proper cases to official referees who are judges of ability, and who sit in open court. That this has been the occasional though perhaps exceptional practice at least before 1932 is sufficiently familiar. But the serious objection taken by the appellants to the order in this case is based on the change made in the law by the Act of 1932 to which I have referred. The appellants object that their professional reputation should not be left to the final decision without appeal on the findings of fact of an official referee, however able and conscientious. The case must eventually depend largely or almost entirely on the facts found. If the case were heard before a judge in the High Court there would be an appeal on fact as well as law. There would be no appeal on fact from an official referee, though the findings of fact in a case like this must almost certainly be most vital. Clauson L.J. thus sums up the position of the judge who, since the Act of 1932 came into force, is asked to order a compulsory reference in a case to which s. 89 applies. " It is not for him," he says, " a mere "question of weighing up the comparative advantages of "various modes of trial. He has to weigh up the advantages "of a trial before an official referee, such as that of providing "a continuous and (if necessary) local and possibly earlier "hearing, and at the same time affording relief to a possibly "overcrowded non-jury list, against the very serious circumstance that in case of error in fact the litigant will be without "remedy. It may well be that in many cases, such as that of "partnership and like accounts, where the errors, if any, are

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"unlikely to be other than errors of quantum in regard to a "few among many items, the circumstance that appeal on "fact is excluded may be of comparatively small importance; "but the circumstance must obviously be considered and "weighed." I agree with the learned Lord Justice in these views and in his further conclusion that in this case the appellants are entitled to have the order reversed; otherwise, in the words of the Lord Justice, they are "deprived of the "protection against error to which they are by law entitled "if the case comes before the normal tribunal of a High Court "judge."

The weight to be given to this consideration must obviously differ in particular cases, but it has to be carefully estimated wherever it is likely to be of serious moment, as it is in this case. It is true that the judge appears to have had this objection brought to his attention, but I am satisfied that he did not give it due weight. No doubt appeals on questions of fact from official referees would be in many or perhaps even most cases futile and vexatious, but it is, I think, to be regretted that the Act of 1932 did not leave to the official referee or the Court of Appeal the power of granting leave to appeal on questions of fact in proper cases. This could now be effected by a simple amendment of the law.

I think Singleton J., who agreed with Slesser L.J. in deciding that the appeal should be dismissed, would have come to a different conclusion but for the special reasons which he stated. He said expressly that he would not himself have made the order which was made by Tucker J., and that he thought it was, on the whole, undesirable to leave the appellants without any appeal on facts in a case involving many complications, even though it might appear that the case could be more conveniently tried before an official referee. His reasons for not acting upon this view seem to be that it was not a matter for the exercise of his discretion, but for the discretion of the judge. I think that that reason is not sound in law. I have already explained that, in my opinion, when the statute gives a right of appeal from an order made by a judge in exercise of his discretion and an appeal is taken,

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the discretion of the appellate court is substituted for that of the judge, as Brett L.J. pointed out in the passage which I have quoted above. The responsibility of deciding is then placed on the appellate court. No doubt that court starts with the presumption that the judge has rightly exercised his discretion. It must be satisfied that the exercise was wrong—" clearly satisfied " is the phrase used; but if the court is said to be satisfied, it must mean that it is " clearly " satisfied. " Clearly " strictly adds nothing, though it is useful to emphasize the strength of the presumption in favour of the judge's order being right. The appellate court must not reverse the judge's decision on a mere " measuring cast " or on a bare balance. The mere idea of discretion involves room for choice and for differences of opinion. I do not, however, understand that Singleton J. felt any doubt that he would not have made the same order as the judge made. Each had exactly the same materials before him. Singleton J. was satisfied in his own mind (that is " clearly " satisfied) what the order should have been. He should accordingly have assumed the responsibility, as Clauson L.J. did, of acting upon that view. His other ground was based upon the words of Lord Atkin, which I have quoted above, as constituting good reason for reversing the judge's decision, " the decision " will result in injustice being done." Singleton J. felt himself unable to say affirmatively that injustice would (i.e., would necessarily) result from the order. I think, as I have explained, that this is a misreading of what Lord Atkin meant. A reasonable danger of injustice is, in my opinion, enough to justify review.

No doubt it is always a difficult and delicate matter for an appellate court to interfere with an order made by a learned judge in the exercise of his discretion. But in proper cases it is the duty of the appellate court to do so. I do not repeat what all their Lordships said on this matter in *Evans* v. *Bartlam* (1) or refer again to the earlier authorities cited there. It is enough to say that in this case I agree that the appeal should be allowed.

(1) [1937] A. C. 473.

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LORD PORTER. My Lords, the power to refer a case for trial to an official referee is now contained in s. 89 (*b*) of the Supreme Court of Judicature (Consolidation) Act, 1925, which, so far as is material, runs as follows :

" In any cause or matter other than a criminal proceeding "by the Crown, ... (*b*) If the cause or matter requires "any prolonged examination of documents or any scientific "or local investigation which cannot in the opinion of the "court or a judge conveniently be made before a jury or "conducted by the court through its other ordinary officers : ". . . . the court or a judge may at any time order the "whole cause or matter, or any question or issue of fact arising "therein, to be tried before a special referee or arbitrator "respectively agreed on by the parties, or before an official "referee or officer of the court."

The section is not very clearly expressed, but I will assume without deciding that it should be read as empowering the reference of any cause or matter where either a prolonged examination of documents is required or where any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers is required. In other words, I shall assume that the question of convenience only comes directly in issue where scientific or local investigation is required, though a prolonged examination of documents itself almost certainly cannot conveniently be tried by a jury and may not be tried with convenience by a judge alone or one of the ordinary officers of the court other than an official referee.

So considering the section, and I do so because it is the construction most favourable to the respondent, the court has power to send a case for trial before an official referee under heading (*b*) only if a prolonged examination of documents or if a scientific or local investigation which cannot in its opinion conveniently be made before a jury or conducted by the court through its ordinary officers is required. In such a case, however, the court is not obliged to send the case for trial in this way ; the word is " may," not " must," order it to be so tried. The appellants took two points: (I.) that there was no evidence before the learned judge or Court of Appeal which gave them jurisdiction to refer; (2.) that in any case the jurisdiction, if it existed, was wrongly exercised.

Some question arose before your Lordships as to the meaning of the phrase "conducted by the court through its ordinary "officers." On an examination of the Judicature Act, 1873, ss. 55, 57 and 77, it appears plain that those words do not refer to trial by a judge alone. By s. 58 official referees are deemed to be officers of the court, and the other officers appear to be those specified in ss. 77 and 79, and include masters, registrars and associates. The sections treat the alternatives as being "by jury" (as indeed was the ordinary way of determining fact in a common law court in 1873) or "con-"ducted through ordinary officers." An illustration of the latter would no doubt be the taking of accounts before a master. Trial by a judge alone is not expressly provided for, but at the present time a trial so conducted is the usual method of trial and must be borne in mind in considering the alternatives to be chosen.

(I.) As to jurisdiction, the respondent relied upon all three grounds for reference. There was, it was said, likely to be a prolonged examination of documents and both scientific and local investigation. I should be loth to hold that there was no evidence upon which such a contention could be founded. The documents which would require prolonged examination were said to be maps and plans of the ground. It appears that the appellants had made two in the course of their employment, and we were told by counsel for the respondent that at the present time eight more had been prepared for the purpose of the trial and some further might be necessary. There is no formal evidence to this effect, but in the ordinary course a master or judge is entitled in preliminary matters to take into account statements by responsible representatives of the parties, and I should be unwilling to fetter their discretion in this respect. But a tribunal is entitled to use its own judgment in deciding how much weight is to be attached to the facts so

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stated, and in the present case the only matters in respect of which it was suggested plans would be required were to show the levels, the drainage system in force in the neighbourhood and the method of drainage suggested.

These seem to me simple matters, and whether one regards "prolonged investigation" as including many plans or a close scrutiny of the plans produced, the investigation in the present case could at best not be greatly prolonged.

So also in the case of scientific and local investigation, I should doubt whether a simple consideration of levels or the possibility that a "view" might assist the tribunal in arriving at a correct conclusion was what was meant by those terms; but in a sense the consideration of the drainage scheme and the possibility of adopting some other method than that provided by the appellants having regard to the levels, and to the suggestion that the difficulty might be solved by pumping, may be regarded as scientific. The observations of Brett L.J. and Holker L.J. in *Ormerod* v. *Todmorden Joint Stock Mill Co., Ld.* (1) are, I think, accurate and in point: "It seems "to me that there was therefore just a sufficiency of scientific "investigation in this matter to prevent us from saying that "the learned judge had no jurisdiction" are the words of Brett L.J., and Holker L.J. said: "If it was a case within "the section, it came within it very slightly indeed, and no "great time could have been occupied in going into the "investigations which were necessary."

My Lords, in this case I am prepared to accept the view that there was some though slight evidence of at any rate two out of the three requisites.

(2.) Should then the case have been referred? No question of the power of your Lordships and of the Court of Appeal to review the order made was raised before the House. Indeed the matter is settled by the decision in *Evans* v. *Bartlam* (2). I quote only from Lord Atkin's speech (3): "I conceive it "to be a mistake to hold, as Greer L.J. seems to do, that the "jurisdiction of the Court of Appeal on appeal from such an

(1) 8 Q. B. D. 664, 678, 684.
(2) [1937] A. C. 473.
(3) Ibid. 480.

"order is limited so that, as the Lord Justice said, the Court "of Appeal 'have no power to interfere with his exercise of "'discretion unless we think that he acted upon some wrong "'principle of law.' Appellate jurisdiction is always statutory: "there is in the statute no restriction upon the jurisdiction "of the Court of Appeal, and while the appellate court in the "exercise of its appellate power is no doubt entirely justified "in saying that normally it will not interfere with the exercise "of the judge's discretion except on grounds of law, yet if "it sees that on other grounds the decision will result in "injustice being done it has both the power and the duty "to remedy it."

It has been said often enough that an appellate court should not interfere in such cases with the discretion of a judge except in what they regard as a plain case. The appellants did not quarrel with this statement, and I think your Lordships are prepared to accept it. Had it not been that the personal reputation of the appellants' firm was at stake it is possible that the order should stand. Even indeed in cases where fraud is alleged, and fraud is a much more serious allegation than incompetence, the trial may be referred to an official referee: *Hoch* v. *Borr* (1); *Sacker* v. *Ragozine & Co.* (2); *Dimmock* v. *Randall* (3); and *Russell & Co.* v. *Harris* (4) are all authorities to this effect.

The principle upon which these decisions rest is, as I understand it, that prima facie it is not a proper exercise of discretion to take the case away from a jury where a charge of fraud is involved, but where the allegation of fraud is so mixed up with the merits of the case as regards matters of account and such like things that the two cannot be tried separately, then the whole matter may be referred to an official referee.

If the charge of fraud cannot be tried without a prolonged examination of accounts or a scientific or local investigation, then a reference may be justified. But unless this be the case, an order to refer will in most cases be so wrong an exercise of discretion as to induce the court to interfere. I would only add that the application of the principles adopted in the authorities cited above to individual cases require some modification as a result of the provisions of s. 1 of the Administration of Justice Act, 1932, to which I refer below.

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(1) (1880) 49 L. J. (C. P.) 665; 43 L. T. 425.

(2) (1881) 44 L. T. 308.

(3) (1889) 5 Times L. R. 358.

(4) (1892) 65 L. T. 752.

Where the charge is not fraud but incompetence the necessity for trial before a judge or judge and jury is no doubt less imperative, but prima facie in those circumstances also the case should not be transferred for trial before an official referee.

In the present instance, in my view, the evidence that the question at issue involves the consideration of matters comprehended within the wording of s. 89 (*d*) of the Act of 1925 is of the slightest, and a scintilla of evidence is not enough, at any rate, in a case where the professional competence of the defendant is attacked.

I should have come to this conclusion even before the passing of s. 1 (i.) of the Administration of Justice Act, 1932, which abolished the right of appeal from an official referee except upon a point of law. That provision, however, appears to me to strengthen the argument for retaining the case for trial before a judge or judge and jury. A litigant whose character or professional ability is attacked should not, unless there are strong reasons to the contrary, be deprived of his right to have the facts reviewed. In a case where discretion has to be exercised, an inability to appeal on fact is one of the matters for consideration, and I see no reason for neglecting it.

I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Berrymans.*

Solicitors for respondent: *Gregory, Rowcliffe & Co., for Gilbert H. White & Co., Guildford.*

[HOUSE OF LORDS.]

Applied. BRITISH MOVIETONEWS *v.* LONDON AND DISTRICT CINEMAS [1951] 1 K. B. 190

H. L. (E.)*
1941
Feb. 20, 21;
May 9.

JOSEPH CONSTANTINE STEAMSHIP LINE, LIMITED . . . . APPELLANTS;

AND

IMPERIAL SMELTING CORPORATION, LIMITED . . . . RESPONDENTS.

xplained. BRITISH
IOVIETONEWS LD.
. LONDON AND DIS-
RICT CINEMAS LD.
[1952] A.C. 166

Ship—Charterparty—Frustration—Explosion on ship—No evidence of cause —Liability of shipowners—Onus of proof.

When frustration of a contract in the legal sense occurs, it automatically determines the contract itself and the promisee can only succeed in an action for damages for the subsequent non-performance of the contract by the promisor if he proves that the determination of the contract was due to the promisor's default. Consequently, when a contract is frustrated by the supervening destruction of essential subject-matter of the contract, the promisor who relies on the frustration is not bound to prove affirmatively that the destruction was not brought about by his neglect or default; it is for the promisee who seeks to avoid the legal result of the frustration to establish that the destruction was due to the neglect or default of the promisor.

To a claim by charterers against shipowners for damages for failure to load a cargo the shipowners pleaded that an explosion on the ship had frustrated the chartered voyage. The cause of the explosion was not ascertained:—

Held, that the shipowners, having established that the explosion had frustrated the commercial object of the adventure, were not bound to prove further that the explosion was not due to their neglect or default, and the defence of frustration succeeded.

Decision of the Court of Appeal [1940] 2 K. B. 430 reversed.

APPEAL from a decision of the Court of Appeal (1).

By a charterparty dated August 5, 1936, the appellant steamship company chartered their steamship *Kingswood* to the respondent corporation to proceed to Port Pirie, South Australia, to load a cargo. On December 26, 1936, the *Kingswood* anchored in the roads at Port Pirie, and after certain negotiations it was agreed that the steamer should remain at the anchorage until January 4, 1937, and should then proceed to her berth. At approximately 8.55 A.M. on January 3, while the steamer was still anchored in the roads, an explosion of great violence occurred from her auxiliary boiler which resulted in such delay that, as was admitted by the charterers, the commercial object of the adventure was frustrated. On the ship's return to England a Board of Trade inquiry was held under the Boiler Explosions Acts, 1882 and 1890, and this was followed by arbitration consequent on a claim by the charterers against the owners for failure to load. It was agreed that the *Kingswood* never became an " arrived ship." The arbitrator found as follows: "Neither those who were responsible for conducting the "Board of Trade inquiry, nor any of the witnesses who gave "evidence before me, claimed to be able to state with any "certainty the causes of the disaster, or the sequence of events "that led up to it. The explosion was one of an unprecedented "character, and no sequence of events which was other than "improbable was suggested as capable of having given rise to "it. The matter was rendered still more difficult by reason "of the fact that the donkeyman, who, on the morning in "question, was the only person to be in the stokehold during "the ninety minutes preceding the explosion, was not available "as a witness." The case set out the various contentions and hypotheses as to the cause of the explosion, and the arbitrator stated: "I am not satisfied that the true cause of the disaster "has as yet been suggested." Subject to the case, the arbitrator awarded that the charterers were entitled to damages.

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(1) [1940] 2 K. B. 430.

* *Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT and LORD PORTER.

Atkinson J. held that the onus was on the charterers to prove that there had not been frustration, that they had failed to discharge that onus, and that their claim failed. The Court of Appeal held that a party, prima facie, guilty of a failure to perform his contract, cannot escape under the plea of frustration, unless he proves that the frustration occurred without his default; that the owners had failed to discharge the onus that was on them; and that there must be judgment in accordance with the terms of the arbitrator's finding. The steamship line appealed.

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Sir Robert Aske K.C. and *Patrick Devlin* (for *Mocatta*, on war service) for the appellants. There is no case in which a defendant to an action for breach of contract who has set up frustration has failed because he did not prove affirmatively that he was not in fault. Frustration is an exception to the express terms of the contract, the position being as though there had been written into the contract the exception of total or partial destruction of the subject-matter. That principle was discussed in *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (1), where it was held that the interruption relied on as excusing further performance of the contract was not such as to do so. So, too, in *Mertens* v. *Home Freeholds Co.* (2), an intervention by the Minister of Munitions brought about by the act of the defendant could not be taken advantage of by him. In *Court Line, Ld.* v. *Dant & Russell, Incorporated* (3) the facts were that a steamer was discharging on the Yangste when hostilities were in progress between China and Japan. A boom had been placed across the river to prevent an attack so that the steamer was detained for three months, and it was held that, in accordance with the principles laid down in *Bank Line, Ld.* v. *Arthur Capel & Co.* (4), the contract had been frustrated and the obligations of both parties under it had come to an end. As Lord Sumner said in the *Bank Line* case (5), "the principle "of frustration of an adventure assumes that the frustration "arises without blame or fault on either side. Reliance cannot "be placed on a self-induced frustration." In *Taylor* v. *Caldwell* (6), A agreed with B to give him the use of a music hall on certain specified days with no express stipulation for the possible event of the destruction of the hall by fire. The hall was destroyed by fire and it was held that the parties were excused from performance of the contract.

Miller K.C., *Pilcher K.C.* and *H. G. Robertson* (for *Charles Stevenson*, on war service) for the respondents. In Halsbury's Laws of England, 2nd ed., vol. vii., p. 208, para. 292, it is said :

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(1) [1916] 2 A. C. 397.
(2) [1921] 2 K. B. 526.
(3) (1939) 44 Com. Cas. 345.
(4) [1919] A. C. 435.
(5) Ibid. 452.
(6) (1863) 3 B. & S. 826.

"Impossibility of performance does not as a rule discharge the "liability under a contract, but in certain cases the promisor is "excused from performing his promise if it is shown that "performance is impossible without any default on his part." That has been introduced into the law of contract, but it is an exception available in certain cases only. A person relying on frustration must establish impossibility without fault or blame on his part: *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (1). In that case Lord Wright referred to what Brett J. said in *Jackson* v. *Union Marine Insurance Co., Ld.* (2), which postulated as one of the conditions of frustration that it should be without any default of either party. There was an absolute obligation on the appellants to have the ship at the port and they failed to perform it.

Sir Robert Aske K.C. replied.

The House took time for consideration.

1941. May 9. Viscount Simon L.C. My Lords, by a charterparty, dated August 5, 1936, the appellants, who were the owners of a steamship called the *Kingswood*, chartered the ship to agents for the respondents for a voyage with a cargo of ores and concentrates from Port Pirie in South Australia to Europe. The vessel duly sailed for Port Pirie to load her cargo. On January 3, 1937, while she was anchored in the roads at Port Pirie, but before she became an "arrived ship," there was an explosion of extreme violence in the neighbourhood of her auxiliary boiler, which caused such damage to the steamer that she could not perform the charterparty, and the appellants gave notice to the respondents to that effect. The respondents claim damages from the appellants, alleging that the latter have broken the charterparty by failing to load a cargo. The appellants set up the defence that the contract was "frustrated" by the destructive consequences to the *Kingswood* of the explosion.

The dispute was referred to the arbitration of Mr. H. U. Willink K.C., and the learned arbitrator has made an interim award in the form of a special case. He finds that the explosion was one " of an unprecedented character " and that no probable sequence of events had been suggested as capable of having given rise to it. The energy released by the explosion was so great that the auxiliary boiler was projected forward through two water-tight bulkheads, finally piercing the collision bulkhead at the forward end and breaking the shell plates at the starboard bow. The distance travelled by the auxiliary boiler, owing to the propulsion of the explosion, before it came to rest in the fore-peak was approximately one hundred and sixty-four feet, while the two main boilers, situated aft of the auxiliary boiler, were forced backwards by the concussion four feet and five feet six inches respectively. It is not disputed that the time needed to repair the damage and to make the *Kingswood* fit for her voyage was so great as to frustrate the commercial object of the adventure. The respondents, however, contend that this frustration does not suffice to excuse the appellants from having to pay damages for non-performance unless the appellants establish affirmatively that the explosion occurred without any fault on their part. The appellants, on the other hand, contend that, once the frustrating event is proved, the onus is on the respondents to establish such default on the part of the appellants as would deprive the latter of their right to rely upon it.

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(1) [1935] A. C. 524.

(2) (1873) L. R. 8 C. P. 572.

After examining three principal theories which were suggested in evidence as possibly accounting for the disaster, the arbitrator declares himself unable to decide whether any one of them provided the true explanation, and he goes on to say that he is not satisfied that the direct cause of the disaster has as yet been suggested at all. His conclusion is that he was not satisfied that any of the servants of the appellants were guilty of negligence. On the other hand, neither was he satisfied that negligence on the part of the servants of the appellants did not cause or contribute to the disaster. It is this nicely balanced conclusion on the facts which provides the question of law which this House has now to decide. That question is whether, when parties have contracted in such circumstances as require a term to be implied in the contract that it shall be determined, and the mutual obligations of the parties discharged, by supervening destruction of essential subject-matter of the contract, the party alleging frustration must prove affirmatively that the destruction has not been brought about by his own neglect or default.

The special case came before Atkinson J., who, in a most careful and elaborate judgment, in the course of which he examined a large number of authorities, decided that the present appellants succeeded (1). On the subject of onus of proof, Atkinson J. cited the well known passage from the judgment of Bowen L.J. in *Abrath* v. *North Eastern Ry. Co.* (2) and applied it as follows: (I have substituted "charterers" and "shipowners" throughout as the description of the parties.) "In such a case as this, the charterers "begin by proving that the ship did not arrive within the "contract time, or at all. If the case stopped there, the "charterers win; but the shipowners then prove an accident "which destroyed the ship as a navigable unit. The ship-"owners prove an event which was the immediate, direct and "dominant cause of that destruction. If the case stopped "there, what is the position? Who wins? Well, I do not "think the answer is a simple one; but in my view the onus "of ultimately satisfying the tribunal that the ship was at "fault rests on the charterers. Whether or no they have "discharged that onus, must be judged by applying the "following principles. (1.) If it appears that the accident "proved was of such a nature as to raise a presumption of "negligence, that is, to afford some evidence of negligence, the "onus is on the shipowners to destroy that presumption created "by the nature of the accident. (2.) If it appears that the "accident proved was of such a nature as to afford no evidence "of negligence, the onus is on the charterers to prove negligence "in fact. (3.) Where the onus is upon the shipowners under "the first principle that onus is discharged by proving facts "from which the inference that the accident was not caused by "negligence is as equally strong (that is, equally consistent with "the facts) as the inference that it was caused by negligence."

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(1) [1940] 1 K. B. 812.

(2) (1883) 11 Q. B. D. 440, 456.

The charterers appealed to the Court of Appeal, which reversed Atkinson J.'s decision. Scott L.J. delivered the first judgment, with which the Master of the Rolls and Goddard L.J. agreed. Scott L.J. declared that this was a "very "simple case," and this view is no doubt the explanation of the fact that his judgment does not provide this House with the arguments or authorities which led the Court of Appeal to their conclusion. The only help your Lordships can get is the assertion by the learned Lord Justice that "a party prima "facie guilty of a failure to perform his contract cannot escape "under the plea of frustration, unless he proves that the frus-"tration occurred without his default. There is no frustration "in the legal sense unless he proves affirmatively that the cause "was not brought into operation by his default." If this assertion is correct, it, of course, disposes of the case. The Court of Appeal refused leave to appeal, which, however, the Appeal Committee of this House thought it right to grant. The House has been assisted by a full and careful argument from counsel on each side in determining the issue.

The question to be answered is not, in my view, a very simple one, and it has not as yet, so far as I can discover, been the subject of direct decision. There is no doubt, of course, that what Lord Sumner in *Bank Line, Ld.* v. *Arthur Capel & Co.* (1) called "self-induced" frustration provides no defence. Thus, in *Mertens* v. *Home Freeholds Co.* (2), Lord Sterndale observed: "It has never been held that a man is entitled "to take advantage of circumstances as a frustration of "the contract if he has brought those circumstances about "himself"; and the Master of the Rolls went on to illustrate his meaning by saying that in *Taylor* v. *Caldwell* (3) the defence of frustration would have failed "if the defendant had "burned down the music-hall himself." Similarly, in *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (4), decided by the Judicial Committee, my noble and learned friend Lord Wright, who delivered the judgment of their Lordships, laid it down that "the essence of 'frustration' is that it should not be due

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(1) [1919] A. C. 435, 452.
(2) [1921] 2 K. B. 526, 536.
(3) (1863) 3 B. & S. 826.
(4) [1935] A. C. 524, 530, 531.

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"to the act or election of the party," and, after quoting Lord Sumner's dictum in the *Bank Line* case (1), went on to say: "Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., "Ld.* (2) quotes from Lord Blackburn in *Dahl* v. *Nelson, Donkin "& Co.* (3), who refers to a 'frustration' as being a matter "'caused by something for which neither party was responsible': and again he quotes Brett J.'s words, which "postulate as one of the conditions of frustration that it "should be 'without any default of either party.' It would "be easy, but it is not necessary, to multiply quotations to "the same effect."

All this, however, is really beside the present point, for the question raised by the arbitrator's award is not whether the defence of frustration fails if the frustration is proved to be "self-induced" (Lord Sumner), or "due to the act or election "of the party" (Lord Wright), or, to use Scott L.J.'s phrase, "brought into operation by his default." The question here is where the onus of proof lies; i.e. whether, when a supervening event has been proved which would, apart from the defendant's "default" put an end to the contract, and when at the end of the case no inference of "default" exists and the evidence is equally consistent with either view, the defence fails because the defendant has not established affirmatively that the supervening event was not due to his default.

I may observe, in the first place, that, if this were correct, there must be many cases in which, although in truth frustration is complete and unavoidable, the defendant will be held liable because of his inability to prove a negative—in some cases, indeed, a whole series of negatives. Suppose that a vessel while on the high seas disappears completely during a storm. Can it be that the defence of frustration of the adventure depends on the owner's ability to prove that all his servants on board were navigating the ship with adequate skill and that there was no "default" which brought about the catastrophe? Suppose that a vessel in convoy is torpedoed by the enemy and sinks immediately with all hands.

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(1) [1919] A. C. 435, 452.
(2) [1926] A. C. 497, 507.
(3) (1881) 6 App. Cas. 38, 53.

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Does the application of the doctrine require that the owners should affirmatively prove that those on board were keeping a good look-out, were obscuring lights, were steering as directed, and so forth? There is no reported case which requires us so to hold. The doctrine on which the defence of frustration depends is nowhere so stated as to place this onus of proof on the party relying on it.

From the classic judgment of Blackburn J. in *Taylor* v. *Caldwell* (1), I extract these passages: ". . . . where, from the "nature of the contract, it appears that the parties must "from the beginning have known that it could not be fulfilled "unless when the time for the fulfilment of the contract "arrived some particular specified thing continued to exist, "so that, when entering into the contract, they must have "contemplated such continuing existence as the foundation "of what was to be done; there, in the absence of any express "or implied warranty that the thing shall exist, the contract "is not to be construed as a positive contract, but as subject "to an implied condition that the parties shall be excused in "case, before breach, performance becomes impossible from "the perishing of the thing without default of the contractor." Later, he says (2): "The principle seems to us to be that, in "contracts in which the performance depends on the continued existence of a given person or thing, a condition is "implied that the impossibility of performance arising from the "perishing of the person or thing shall excuse the performance." It is true that the earlier of these passages stated the requirement that the impossibility should have arisen "without "default of the contractor," and a similar qualification was insisted on in many other cases, e.g. by Viscount Haldane in the *Bank Line* case (3), where he said: "where people enter "into a contract which is dependent for the possibility of its "performance on the continued availability of the subject-"matter, and that availability comes to an unforeseen end by "reason of circumstances over which its owner had no control, "the owner is not bound unless it is quite plain that he has

(1) 3 B. & S. 826, 833.

(2) Ibid. 839.

(3) [1919] A. C. 445.

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"contracted to be so." But this is not the same thing as saying that the defendant must disprove default. The qualification means, in my opinion, no more than that, unless default is proved or ought to be inferred, the defence is complete. Where the onus lies is still to be determined.

In this connection it is well to emphasize that when "frustra-"tion" in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically. The plaintiff sues for breach at a past date and the defendant pleads that at that date no contract existed. In this situation the plaintiff could only succeed if it were shown that the determination of the contract were due to the defendant's "default," and it would be a strange result if the party alleging this were not the party required to prove it.

The doctrine of discharge from liability by frustration has been explained in various ways—sometimes by speaking of the disappearance of a foundation which the parties assumed to be at the basis of their contract, sometimes as deduced from a rule arising from impossibility of performance, and sometimes as flowing from the inference of an implied term. Whichever way it is put, the legal consequence is the same. The most satisfactory basis, I think, on which the doctrine can be put is that it depends on an implied term in the contract of the parties. This was the basis adopted in *Taylor* v. *Caldwell* (1) which is practically the first case of the modern line of authorities. It is the view taken in many later cases—nowhere more clearly than in Lord Loreburn's exposition in *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (2). It has the advantage of bringing out the distinction that there can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur. Discharge by supervening impossibility is not a common law rule of general application, like discharge by supervening illegality; whether the contract is terminated or not depends on its terms and the surrounding circumstances in each case. Moreover, it seems to

(1) 3 B. & S. 839.

(2) [1916] 2 A. C. 397, 403, 404.

me that the explanation of supervening impossibility is at once too broad and too narrow. Some kinds of impossibility may in some circumstances not discharge the contract at all. On the other hand, impossibility is too stiff a test in other cases—for example, if the coronation cases, such as *Krell* v. *Henry* (1), are to be regarded as rightly decided on their facts, the explanation of such contracts coming to an end is not to be classed as due to impossibility, for the seats let remained available and the actions in those cases were brought for the payment or return of money. Every case in this branch of the law can be stated as turning on the question whether from the express terms of the particular contract a further term should be implied which, when its conditions are fulfilled, puts an end to the contract.

If the matter is regarded in this way, the question is as to the construction of a contract taking into consideration its express and implied terms. The implied term in the present case may well be—"This contract is to cease to be binding "if the vessel is disabled by an overpowering disaster, provided "that disaster is not brought about by the default of either "party." This is very similar to an express exception of "perils of the seas," as to which it is ancient law that by an implied term of the contract the shipowner cannot rely on the exception if its operation was brought about either (*a*) by negligence of his servants, or (*b*) by his breach of the implied warranty of seaworthiness. If a ship sails and is never heard of again the shipowner can claim protection for loss of the cargo under the express exception of perils of the seas. To establish that, must he go on to prove (*a*) that the perils were *not* caused by negligence of his servants, and (*b*) were not caused by any unseaworthiness? I think clearly not. He proves a prima facie case of loss by sea perils, and that he is within the exception. If the cargo owner wants to defeat that plea it is for him by rejoinder to allege and prove either negligence or unseaworthiness. The judgment of the Court of Appeal in *The Glendarroch* (2) is plain authority for this.

The point as to onus of proof is put very clearly in the third paragraph of Article 91 of Scrutton on Charterparties, 14th ed., p. 297. See also Carver on Carriage by Sea, 8th ed., s. 78. The decision in *The Northumbria* (1) involves the same conclusion. Another example, from the law of bailment, confirms this view. Assume a bailment of goods to be kept in a named warehouse with an express exception of loss by fire. Proof of destruction by fire would prima facie excuse the bailee. The bailor could counter by alleging either (*a*) fire caused by the negligence of the bailee or (*b*) goods when burnt were not stored in the agreed warehouse. But it would be for the bailor not only to allege but to prove either (*a*) or (*b*), though he might rely on facts proved or admitted by the bailee as establishing his proposition. Moreover, there is at any rate an inference leading to the same view in the well known case of *Jackson* v. *Union Marine Insurance Co., Ld.* (2). The plaintiff in that case had entered into a charterparty under which his vessel was to proceed from Liverpool to Newport and there take on board a cargo of iron rails for a voyage to San Francisco. The plaintiff effected an insurance on the chartered freight for the voyage with the defendants and the question was whether, owing to the vessel going aground upon the rocks in Carnarvon Bay on her way from Liverpool to load at Newport, the adventure had been frustrated so as to involve the loss of the chartered freight by perils of the sea. Bramwell B., in delivering the judgment of the majority of the Court of Exchequer Chamber (3), makes it plain that the long delay due to the stranding, and the consequent impossibility of quick repair, would only operate to bring the contract to an end if the stranding arose by no default of the ship. The condition precedent was that the vessel should arrive at Newport in a reasonable time and, says Bramwell B. (3), "the condition "precedent has not been performed, but by default of neither." What is noticeable is that, so far as appears from the report, frustration was treated as established without it being thought to be a necessary part of the plaintiff's case to disprove default, while the defendants did not choose, or were not able, to establish default themselves. The report of the case in the court below (1) leads to the same inference. Brett J. (2), delivering the judgment of the majority, uses the phrase "without any default "of either party." The facts as to the stranding are shortly given (3) and the questions left to the jury (approved in both courts) (4). But it never occurred to anyone in either court to suggest that one essential question that ought to be left to the jury was: "Have the shipowners proved that the stranding "took place without negligence or default on the part of them"selves or their servants?"

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(1) [1903] 2 K. B. 740.

(2) [1894] P. 226.

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(1) [1906] P. 292.
(2) (1874) L. R. 10 C. P. 125.
(3) Ibid. 142, 144.

I reach the conclusion that Atkinson J. took the right view in this case, and that the Court of Appeal was mistaken in holding that once the frustration in fact was established and any inference of default alleged to arise from the fact that the ship was under the control of the appellants' servants was negatived, it lay on the appellants to go further and satisfy the arbitrator positively that the frustration occurred without their default.

For purposes of clearness and to avoid possible misunderstanding hereafter, I must add (though this is not necessary for the present decision) that I do not think that the ambit of "default" as an element disabling the plea of frustration to prevail has as yet been precisely and finally determined. "Self-induced" frustration, as illustrated by the two decided cases already quoted, involves deliberate choice, and those cases amount to saying that a man cannot ask to be excused by reason of frustration if he has purposely so acted as to bring it about. "Default" is a much wider term and in many commercial cases dealing with frustration is treated as equivalent to negligence. Yet in cases of frustration of another class, arising in connection with a contract for personal performance, it has not, I think, been laid down that, if the personal incapacity is due to want of care, the plea fails. Some day it may have to be finally determined whether a prima donna is excused by complete loss of voice from an executory contract to sing if it is proved that her condition was caused by her carelessness in not changing her wet clothes after being out in the rain. The implied term in such a case may turn out to be that the fact of supervening physical incapacity dissolves the contract without inquiring further into its cause, provided, of course, that it has not been deliberately induced in order to get out of the engagement.

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(1) L. R. 8 C. P. 572.
(2) Ibid. 581.
(3) Ibid. 572.
(4) Ibid. 573.

I move that this appeal be allowed and that the order of Atkinson J. be restored. The appellants must have their costs here and in the Court of Appeal.

VISCOUNT MAUGHAM. My Lords, this is an appeal arising on a special case stated in an interim award to determine a question of liability for damages under a charterparty. The claimants were the charterers of the vessel *Kingswood* and the damages claimed were for failure by the shipowners to load a cargo at Port Pirie in New South Wales. The facts are, of course, to be found only in the special case which is sufficiently stated in the opinion of the Lord Chancellor, and it is unnecessary for me to repeat them. It will be enough for my purpose to say that the damage to the ship was due to an explosion which occurred before the vessel became an "arrived" ship, that the explosion was one of an unprecedented character, that no probable sequence of events was suggested by either side as capable of having given rise to it, and that the learned arbitrator was not satisfied that it was due to the negligence of the shipowners or their servants or that the true cause of the disaster had been suggested in the course of the arbitration.

In these circumstances the single question which arises on the appeal may be stated thus: The appellants (the shipowners) contended in answer to the respondents' (the charterers') claim for damages that the destruction of the ship as a navigable unit had resulted in the frustration of the adventure. The respondents replied that the doctrine of frustration is applicable only if performance of the contract becomes impossible without the default of either party, and that the onus, therefore, lay on the appellants to establish that they and the master and crew and the other servants of the appellants were not guilty of default causing or contributing to the disaster. The respondents contend that the findings of the special case show that this onus has not been discharged, and accordingly that the doctrine of frustration does not apply. Atkinson J. in an elaborate judgment referring to all or nearly all the relevant cases, did not agree with this contention as regards onus, and he, therefore, decided in favour of the appellants. The Court of Appeal took the other view, and in a very terse judgment it was observed that "there is no frustration in the legal sense unless he" (the party prima facie guilty of a failure to perform his contract) "proves affirmatively that the cause was not brought into "operation by his default." This was directly contrary to the opinion of the trial judge. The question is which of these two views is correct.

The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made. The doctrine in its modern form was first stated by Blackburn J. delivering the judgment of the Queen's Bench in *Taylor* v. *Caldwell* (1). The court there was dealing with a case in which it was clear that the parties had contracted on the basis that a certain music hall would continue to exist for the purpose of giving concerts on four specified days. It had been accidentally burnt down. It was held that such a contract must be regarded as "subject "to an implied condition that the parties shall be excused in "case, before breach, performance becomes impossible from "the perishing of the thing without default of the contractor." This was followed four years later by another case also arising out of a fire. Blackburn J. there amended his statement of the principle by substituting for the words "without default "of the contractor" the words "without fault on either side": *Appleby* v. *Myers* (2).

This amendment has ever since been accepted as correct. The principle, however, is not limited to cases of contracts de certo corpore. It also applies to a number of cases in which the existence or continued existence of some specific thing is

(1) 3 B. & S. 826.

(2) (1867) L. R. 2 C. P. 651.

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not involved, and in those cases its application is sometimes difficult: *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (1). The proposition stated by the Court of Appeal in a general form would appear to be applicable to all these cases. It is, however, to be noted that it is often a mere accident, for instance the condition of the market, which decides the question which of two parties will desire to rely on the doctrine of frustration. Yet it follows that, if the Court of Appeal is right, there are cases in which frustration would be held not to apply if the party setting up the principle was unable to discharge the onus of proof held to be on him, while a different result would follow if the other party were relying on frustration and he was able to discharge the onus.

The doctrine of frustration has been considered in more than fifty reported cases, the references to which will be found in the article on Contracts (for which a very eminent author is responsible) in Halsbury's Laws of England, 2nd ed., vol. vii., p. 215 et seq., and one would have thought that there was nothing in principle left to be determined by the courts. It is a singular circumstance that there is not, so far as counsel could ascertain, a single case in which the question of onus appears to have been distinctly raised till the present case. The importance of the matter, therefore, can easily be exaggerated. However, your Lordships have now to decide the point, and it is fortunately one of considerable interest.

A consideration of the reported cases, and in particular of those decided in this House, leads me to state four propositions which I think bear upon the problem :—

First, whether or not the doctrine rests simply on a term or condition to be implied in the contract itself as a matter of its true construction, or whether it is otherwise to be explained (e.g., by a legal presumption) it is clear that it is based on the presumed common intention of the parties. The consequences of the application of the doctrine are the same in either case. The present question can, therefore, be tested by asking what term or condition as to onus of proof ought to be implied here in relation to the destruction of the vessel.

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(1) [1916] 2 A. C. 397, 423.

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Secondly, if the doctrine is held applicable, the legal result is that the event in question frustrated the commercial adventure and "brought the contract to an end forthwith "and automatically."

Thirdly, "whatever the consequences of the frustration may "be upon the conduct of the parties, its legal effect does not "depend on their intention or their opinions or even knowledge "as to the event." Its mere occurrence is taken to show that further prosecution of the adventure under the contract is impossible. In both these propositions I am citing the words used by Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (1).

Fourthly, each party is left in the position he was in when the event occurred, and legal rights already accrued under the contract are unaffected.

My Lords, I attach so much importance to these conclusions, and especially to the conclusion as to the automatic effect of the event which prima facie effects a frustration, that I will add a few words as to the authority which I have quoted. *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (1) was a decision of the Privy Council. The board consisted of Viscount Dunedin, Lord Sumner and Lord Wrenbury, and Lord Sumner delivered the judgment. The time charter in the case related to a named ship and it contained an arbitration clause. The ship was requisitioned by the government before the agreed date of delivery, and was not released till some two years later. There followed an arbitration under the clause. An award was made by which a large sum was awarded to the shipowners as damages for the refusal of the charterers to take delivery after the ship was released. An action on the award was brought by the shipowners in Hong Kong. The judge held that the charterers had so conducted themselves as to exclude the doctrine of frustration on which the charterers relied. This was held to be an erroneous view. The charterers had contended all along that, as the result of frustration, the whole contract had come to an end, and that the arbitrator, therefore, had no jurisdiction. This contention prevailed. The elaborate judgment delivered by Lord Sumner was supported by a number of authorities dealing with the principle and the effect of frustration, and he referred, I think, to all the previous decisions of this House on the matter. I cannot bring myself to doubt that this high authority (though it does not bind this House) is right and that the reasons given for it ought to be accepted as correct.

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(1) [1926] A. C. 497, 505, 507, 509.

My Lords, I think the propositions that I have derived from that case go a long way to show that the view as to onus of proof of absence of default, accepted though it was by the Court of Appeal, must be ill-founded. Frustration operates automatically—for the good or ill of both parties. It does not resemble the case of repudiation or rescission of contract. In those cases, as was pointed out by Lord Sumner (1), the party aggrieved by the conduct of the other party has an option to treat the contract as at an end and to claim damages for its total breach. It is a right given by law in vindication of a breach. Frustration, on the other hand, is "irrespective "of the individuals concerned, their temperaments and failings, "their interest and circumstances. It is really a device, by "which the rules as to absolute contracts are reconciled with "a special exception which justice demands" (1). The phrase "without fault on either side" which qualifies the doctrine of frustration is intelligible enough if it means that a party who has disabled himself from performing his promise, or who has done something to prevent the other party from performing his part of the contract, cannot set up a plea of frustration in a case in which his act or default has rendered the performance of the contract impossible. To quote again from Lord Sumner: "I think it is now well settled that the principle "of frustration of an adventure assumes that the frustration "arises without blame or fault on either side. Reliance cannot "be placed on a self-induced frustration; indeed, such conduct "might give the other party the option to treat the contract "as repudiated": *Bank Line, Ld.* v. *Arthur Capel & Co.* (2). This passage was cited with approval by the Privy Council in

(1) [1926] A. C. 497, 510.

(2) [1919] A. C. 435, 452.

Maritime National Fish, Ld. v. *Ocean Trawlers, Ld.* (1), where the judgment of the Board was delivered by my noble friend Lord Wright.

My Lords, if the principle of frustration is that the contract automatically comes to an end irrespective of the wishes of either party, provided only that the event is "caused by "something for which neither party was responsible" (see *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (2)) I can see no firm ground for the proposition that the party relying on frustration in an action or in arbitration proceedings must establish affirmatively that "the cause was not brought into "operation by his default." (I am quoting from the judgment of Scott L.J. in the present case.) Such a proposition seems to me to be equivalent to laying down that the determination of the contract by frustration is not the automatic result of the event, but is dependent on the option of the parties, for neither party can be compelled to call evidence to prove affirmatively that the cause was not due to his default. Such a view is not, in my opinion, reconcilable with the judgment in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (3).

Other considerations seem to me to lead to the same conclusion. Frustration may occur, as I have already mentioned, in very different circumstances. First, in cases resembling the present where there has been the destruction of a specific thing necessary for the performance of the contract. Secondly, where performance becomes virtually impossible owing to a change in the law. Thirdly, where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated. Fourthly, where performance becomes impossible by reason of the death or incapacity of a party whose continued good health was essential to the carrying out of the contract. There may be other categories, and I have not forgotten the coronation and the review cases, of which *Krell* v. *Henry* (4) is the leading example, but they do not come within the same principle of impossibility, and I do not desire to express any opinion about them. Taking the four groups which I have mentioned, a consideration of the many different kinds of events leading to the impossibility of performance leads, I think, to the view that it would be unreasonable, if not absurd, to lay on the person relying on frustration the onus of proof that he was not responsible for the event. In the first category we have the case of fire. Destruction of a building by fire is generally due to someone's fault or negligence. If the owner of a large building, in which he employs many persons, sets up the doctrine of frustration on the ground of the destruction of the building by fire, it may be quite impossible for him to prove affirmatively that one of his employees who has left his service was not guilty of default. If both the plaintiff and the defendant have had duties to perform in the building under the terms of the contract, the cause of the fire may be due to either of them. It would not be reasonable to throw this heavy onus on the party setting up frustration, since, having regard to the fourth proposition above stated, it may be mere accidental circumstances which cause one party rather than the other to rely on the doctrine. If the destruction of the thing is due to earthquake, volcanic action, flood, storm, lightning, restraint of princes, change in the law and so forth, it would seem to be absurd to apply the suggested doctrine of onus except in very unlikely circumstances. This shows, at any rate, that the rule stated by the Court of Appeal requires some qualification. Where the contract is for personal services, the performance of which by one party depends on his health and life, no one has ever yet suggested that, if the person promising the personal service is alive and sets up frustration, he must show that his illness was not due to some rash act on his part. Nor, if the promisor is dead, would it, I think, be reasonable to expect his legal personal representative to prove absence of some default leading to the disaster.

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(1) [1935] A. C. 524, 530.
(2) Ibid. 531.
(3) [1926] A. C. 497.
(4) [1903] 2 K. B. 740.

My Lords, I also agree with the view expressed by Atkinson J. that the term or condition which might reasonably be implied in relation to the destruction of the vessel in this case, or in any case of true frustration, does not throw on the plaintiff or claimant the burden of proving something which it may be

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impossible in practice to prove. The term or condition is not for the benefit of one party rather than the other. As I have already indicated, it is usually impossible at the date of the contract to know, if frustration of the adventure takes place, which of the two parties will desire to rely on the doctrine. In these circumstances I cannot see why a court should decide that the parties ought to be presumed to have intended that the ordinary rules as to onus of proof ought not to apply. After all, the question is essentially one of common sense as related to justice. Two persons have entered into a contract which cannot be performed unless a certain subject-matter continues to exist. Ought either of the parties, after it ceases to exist, to be entitled to sue the other for damages based on his failure to perform the impossible? The law intervenes with the doctine of frustration, and declares that the contract is at an end. Is the doctrine subject to the condition as to onus of proof which the Court of Appeal thinks should be implied? To my mind, that is a condition which is artificial and which may operate in some cases with great injustice, and your Lordships have not heard any sufficient reason for thinking that it forms, or ought to form, part of the rule.

For the reasons above stated I have come to the conclusion, with all respect to the Court of Appeal, that their view is incorrect and ought not to prevail. Agreeing with the learned trial judge, I think the burden of proof in any particular case depends on the cirumstances under which the claim arises. In general the rule which applies is "Ei qui affirmat non ei qui "negat incumbit probatio." It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons. The position as to proof of non-responsibility for the event in such a case as the present is not very different from the position of a plaintiff in an action for negligence where contributory negligence on his part is alleged. In such a case the plaintiff must prove that there was some negligent act or omission on the part of the defendant which caused or materially contributed to the injury, but it is for the defendant to prove affirmatively, if he so contends, that there was contributory negligence on the part of the person injured, though here again the onus may easily be shifted: *Wakelin* v. *London & South Western Ry. Co.* (1); *Abrath* v. *North Eastern Ry. Co.* (2). The mere circumstances of the occurrence which led to the event may be sufficient to supply prima facie evidence that the plaintiff is himself responsible for it, but if that is not so it is for the defendant to prove that which he alleges.

My Lords, on this view of the law in relation to the onus of proof in a case where frustration is prima facie established, since the voyage admittedly became impossible, we still have to determine whether the facts found in the special case, in the absence of further evidence as to the cause of the explosion, are sufficient to lead to the conclusion that the appellants were to blame for the disaster. The respondents plainly were in no way to blame. The explosion of the auxiliary boiler took place on the appellants' ship, and no doubt it might have been due to a default on the part of the master or the crew. Here a curious circumstance must be mentioned. The appellants themselves had pleaded that the explosion arose or resulted from an act of neglect or default of the master or the servants in the navigation or management of the ship, or alternatively from a latent defect in the boiler not discoverable by due diligence. They so pleaded in the belief that proof of either of such allegations would relieve them from liability either under Article IV. (2.) (*a*) or (2.) (*p*) of the Schedule to the Australian Sea Carriage of Goods Act, 1924, or under art. 7 of the charterparty. This view of the law was, I think, ill-founded. Atkinson J. so decided, and the appellants have not contended that his decision in that respect was erroneous. But it would seem clear that the appellants were endeavouring to establish affirmatively in the arbitration that their own servants were to blame, and it may be remarked that no weight can, therefore, be attached to the fact that the donkeyman was paid off in Australia three weeks after the explosion. Your Lordships have, of course, no knowledge of the course pursued as regards calling evidence in the arbitration. All that is known is that evidence was called,

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(1) (1886) 12 App. Cas. 41.

(2) 11 Q. B. D. 440, 456.

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and that, as the result of it, the arbitrator was not satisfied that any of the servants of the appellants were guilty of any of the negligence alleged, nor did he find that there was any latent defect in the boiler not discoverable by due diligence, or that, if there were such a defect, it caused or contributed to the explosion of the boiler. It is true that he also stated that he was not satisfied that negligence on the part of the servants of the appellants did not cause or contribute to the disaster. That, in my view, amounts to a finding that, notwithstanding the evidence, there was a possibility that there had been negligence or default on the part of the servants of the appellants. If, however, I am right in the opinion above expressed that the onus of establishing absence of default did not rest on the appellants, the mere possibility of default on their part is not sufficient to disentitle them to rely on the principle of frustration. For these reasons I am of opinion that the appeal should be allowed and that the order of Atkinson J. should be restored with costs here and below.

Lord Russell of Killowen (read by Lord Porter). My Lords, as a general rule impossibility of performance does not release from liability the person who has promised the performance. An exception, however, exists in the case of contracts the performance of which is necessarily dependent on the continued existence, or the continued existence in a sound condition, of a person or thing. In the case of such a contract, the cesser of that existence may release the promisor from liability on the ground of what has been termed frustration of the contract. For convenience' sake I will refer to this cesser of existence as the destruction of the corpus.

The question raised on this appeal is whether, on the facts as found by the arbitrator, the doctrine of frustration applies, with the result that the appellants are released from liability under the charterparty. The answer seems to me to depend on what is the correct statement of the doctrine, i.e., on the correct statement of what the law requires to be established in order that the promisor should be relieved from liability.

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The respondents contend that it must be affirmatively established, as a condition precedent to the application of the doctrine in the promisor's favour, that, in respect of the destruction of the corpus, he is free from fault or default. In other words, he must prove that he is not responsible for that destruction. The appellants contend that on the destruction of the corpus, the doctrine applies in the promisor's favour unless it is established that he is responsible for the destruction. The rival contentions may be stated thus: (1.) The appellants say: "Frustration will excuse unless "it is proved to be self-induced." (2.) The respondents say: "Frustration will not excuse unless it is proved not to be self-"induced."

My Lords, in my opinion the appellants' contention is correct. In coming to this conclusion I am influenced by three considerations. First, the proving of a negative, a task always difficult and often impossible, would be a most exceptional burden to impose on a litigant. Secondly, I know of no case of frustration in the books, in which an attempt has been made, or called for, to prove the suggested negative. Thirdly, the statement of the doctrine in the authorities does not in any way compel us to adopt the contention of the respondents.

In *Taylor* v. *Caldwell* (1) Blackburn J. states the doctrine in these words: "The principle seems to us to be that, in "contracts in which the performance depends on the con-"tinued existence of a given person or thing, a condition is "implied that the impossibility of performance arising from "the perishing of the person or thing shall excuse the per-"formance." No mention is there made of absence of fault or default. It is true that in an earlier part of his judgment (2) he said that such a contract was to be construed as "subject "to an implied condition that the parties shall be excused "in case, before breach, performance becomes impossible "from the perishing of the thing without default of the "contractor," but I do not read those last five words otherwise than as a proviso or exception to the doctrine, namely, that, if the destruction of the corpus has been brought about by the

(1) 3 B. & S. 826, 839.

(2) Ibid. 833.

fault or default of one of the contracting parties, that party would not be excused. In the words of Lord Sumner in the *Bank Line* case (1): "Reliance cannot be placed on a self-"induced frustration." The language of Blackburn J. does not, in my opinion, justify, much less compel, the view that proof of absence of fault or default is a condition precedent to the application of the doctrine.

Whether the doctine is applicable in favour of a contractor who is sued on the contract, will depend in each case on the ultimate result of the whole evidence, the position of the parties as regards burden of proof varying from time to time as indicated by Bowen L.J. in *Abrath* v. *North Eastern Ry. Co.* (2). The defendant will prove the destruction of the corpus, and (where possible) the event which brought it about. It may be that the event is of such a nature as of itself to raise a prima facie case of fault or default in the defendant. Unless he displaces that prima facie case, he will be unable to rely on the doctrine. The frustration will stand as self-induced. On the other hand, it may be that nothing is known as to what event brought about the destruction, or the known event may be of such a nature as of itself to raise no prima facie case of fault or default in the defendant. If the matter rests there he will be excused from liability under the contract. The plaintiff, however, may by cross-examination, or independent evidence or both establish a case of fault or default in the defendant. If the matter rests there, the defendant will be unable to rely on the frustration which will stand as self-induced. In every case the contractor will succeed or fail in his defence of frustration according as it is not or is found as the result of the whole evidence that the frustration was self-induced.

I turn now to the arbitrator's award in the present case to ascertain what has been found as the result of the whole evidence adduced by the parties. He finds that the event which brought about the destruction of the corpus, namely, the explosion, "was one of an unprecedented character, and "no sequence of events which was other than improbable,

(1) [1919] A. C. 452.

(2) 11 Q. B. D. 440, 456.

"was suggested as capable of having given rise to it." No prima facie case of fault or default in the appellants can, in my opinion, be raised by the event which here caused the destruction of the corpus. The other material findings of the arbitrator are as follows: (1.) he does not find that the appellants' servants were guilty of negligence as alleged, but (2.) he is not satisfied that negligence on their part did not cause or contribute to the disaster. There is here no finding of fault or default in the appellants. In the circumstances, and as a result of the evidence and findings in this case, it appears to me impossible to say that the frustration (which is admitted) was self-induced. The frustration accordingly operates to relieve the appellants from liability under the charterparty.

My Lords, I desire to add a word in relation to the phrase "self-induced frustration." No question arises on this appeal as to the kind or degree of fault or default on the part of the contractor which will debar him from relying on the frustration. The possible varieties are infinite, and can range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of the prima-donna who sits in a draught and loses her voice. I wish to guard against the supposition that every destruction of corpus for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase.

I would allow this appeal and restore the order of Atkinson J.

LORD WRIGHT. My Lords, this appeal has to deal with an award of an arbitrator in which he states for the decision of the court the question whether on the facts as found and on the true construction of the charterparty the respondents in this appeal are entitled to damages from the appellants for non-performance of the charterparty.

The dispute arose out of an explosion which occurred in the auxiliary boiler of the appellants' steamship *Kingswood* while she was anchored in the roads of Port Pirie. She had arrived there in pursuance of a charterparty of August 5, 1936, made between appellants as owners and the respondents as charterers. Under it she was to be ready to load a full ore cargo at Port Pirie at any customary wharf or wharves as ordered for carriage to a port or ports in England or the continent. She was expected to arrive at Port Pirie about the end of December, 1936, or early January, 1937. On December 26, 1936, she anchored in the roads of Port Pirie, having sailed in ballast from Lourenço Marques. It was agreed between the parties that the *Kingswood* should remain at her anchorage until January 4, 1937, and then proceed to her loading berth, on arrival at which time should count. While she still lay at the anchorage and before she became an arrived ship the explosion occurred in the auxiliary boiler. It was of unprecedented character (in the words of the arbitrator) and took place within the boiler. The arbitrator found that it was due to the fact that there was a sudden opening of communication between the water and steam space and one or both of the combustion chambers. The energy released was such that the main boilers situated aft of the auxiliary boiler were set aft by the concussion of the explosion four feet and five feet six inches respectively, at which points their movement was arrested, whereas the auxiliary boiler itself was projected forward through two watertight bulkheads, finally piercing the collision bulkhead and breaking the shell plates at the starboard bow. The damage to the steamer was so serious that the appellants gave notice that they could not perform the charterparty. The respondents then claimed damages in the arbitration.

It was admitted in the arbitration that the delay caused by the damage to the steamer was such as to frustrate the commercial object of the adventure. The appellants resisted the claim on the ground that the frustration released them from liability for further performance. The respondents contested this defence on the ground that such a defence was only maintainable if the frustration took place without fault on the part of the appellants, and that it was for the appellants to show absence of fault. There had in fact been a Board of

Trade inquiry, but the arbitrator observed that neither those who were responsible for conducting the Board of Trade inquiry nor any of the witnesses who gave evidence before him claimed to be able to state with any certainty the causes of the disaster or the sequence of events that led up to it, and that no sequence of events which was other than improbable was suggested as capable of having given rise to it. The arbitrator stated three principal theories of the disaster which had been put forward, but the most he could say was that, though each theory might be possibly correct, he was not satisfied by it. He summed up the final result in the words: "I am not satisfied that the true cause of the disaster has as "yet been suggested." Subject to the case stated, he awarded in favour of the respondents.

Thus the question has come before the court whether in the case of an admitted frustration of the adventure, without default of either party being proved, the promisors, in this case the appellants, are liable in damages as for breach of the contract. Atkinson J., before whom the special case came in the King's Bench Division, decided in favour of the appellants, on the ground that no default was established, but the casualty was unexplained, and, accordingly, he set aside the arbitrator's award. His decision was overruled by the Court of Appeal and the arbitrator's award was restored. In the Court of Appeal Scott L.J., in giving the leading judgment said: "A party prima facie guilty of a failure to "perform his contract cannot escape under the plea of "frustration unless he proves that the frustration occurred "without his default. There is no frustration in the legal "sense *unless he proves affirmatively* that the cause was not "brought into operation by his default." The gist of the whole judgment, which is very brief, is contained in the words which I have italicised. No authority is cited.

The statement of the principle by Scott L.J. is manifestly different from the statement by Blackburn J. in *Taylor* v. *Caldwell* (1): "The principle seems to us to be that in "contracts in which the performance depends on the continued

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(1) 3 B. & S. 826, 839.

"existence of a given person or thing, a condition is implied "that the impossibility of performance arising from the "perishing of the person or thing shall excuse the performance." He justified his conclusion on the ground that by the nature of the contract it was apparent that the parties contracted on the basis of the continued existence of the music hall, that being essential to the performance, because it was in that building that the performance was to take place. From this the condition releasing the parties was to be implied by law. Blackburn J. elsewhere in his judgment added as a sort of warning " without the fault of either party." Clearly a party to a contract who by his fault has caused the impossibility, cannot take advantage of his own wrong. In such a case he has prevented performance in the substantial sense, as in the illustration given by Willes J. in *Inchbald* v. *Western Neilgherry Coffee, etc., Co., Ld.* (1) of " the case in "Bulstrode where the defendant contracted to deliver to the "plaintiff a horse, but poisoned him before delivery," and was held liable in damages because he had prevented the contemplated performance.

But Blackburn J., though he qualified the rule he stated by excepting the fault or default of the contractor or of either party, did not add that the defendant relying on impossibility of performance must prove affirmatively that the impossibility was not due to his own default. The Court of Appeal in so stating the rule, have made a vital change in the rule. I must consider what justification there is for that change. To do so I must briefly explain my conception of what is meant in this context by impossibility of performance, which is the phrase used by Blackburn J. In more recent days the phrase more commonly used is " frustration of the contract " or more shortly " frustration." But " frustration of the contract " is an elliptical expression. The fuller and more accurate phrase is " frustration of the adventure or of the commercial or "practical purpose of the contract." This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond contracts which depend on the

(1) (1864) 17 C. B. (N. S.) 733, 741.

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existence, at the relevant time, of a specific object, as in the instances given by Blackburn J., to cases where the essential object does indeed exist, but its condition has by some casualty been so changed as to be not available for the purposes of the contract either at the contract date, or, if no date is fixed, within any time consistent with the commercial or practical adventure. For the purposes of the contract the object is as good as lost. Another case, often described as frustration, is where by State interference or similar overriding intervention the performance of the contract has been interrupted for so long a time as to make it unreasonable for the parties to be required to go on with it. Yet another illustration is where the actual object still exists and is available, but the object of the contract as contemplated by both parties was its employment for a particular purpose, which has become impossible, as in the coronation cases. In these and similar cases, where there is not in the strict sense impossibility by some casual happening, there has been so vital a change in the circumstances as to defeat the contract. What Willes J. described as substantial performance is no longer possible. The common object of the parties is frustrated. The contract has perished, quoad any rights or liabilities subsequent to the change. The same is true where there has been a vital change of the law, either statutory or common law, operating on the circumstances, as, for instance, where the outbreak of war destroys a contract legally made before war, but which, when war breaks out, could not be performed without trading with the enemy. I have given this bare catalogue to illustrate the application in practice of the doctrine of frustration in order to show how wide and various is the range of circumstances to which it may extend and how manifold are the complications involved in the rule laid down by the Court of Appeal that there is an affirmative onus of disproving fault on the party claiming to rely on frustration.

But the suggested rule seems to me to be both anomalous and unreasonable. The doctrine of frustration is intended to achieve a just and reasonable result. Blackburn J. in

Taylor v. *Caldwell* (1) starts his judgment by referring to what he regards as the general rule of English law that a party who positively contracts to do a thing must perform it or pay damages even though, by unforeseen accidents, performance has become impossible. And a dictum unnecessary to the decision of the Court of King's Bench in *Paradine* v. *Jane* (2) is often quoted: "When the party, by his own conduct, "creates a duty or charge upon himself, he is bound to make "it good, if he may, notwithstanding any accident by inevitable "necessity, because he might have provided against it by his "contract." I am not clear what "if he may" means. It may mean "legally may," but the reference to inevitable accident seems inconsistent with reading "if he may" as reserving impossibility. But the results of holding a man to the absolute terms of a contract would often be so unjust that, from early times, as Blackburn J.'s examples in *Taylor* v. *Caldwell* (1) show, the courts set themselves to avoid these results wherever justice seemed to require it. The doctrine of frustration is thus, in Lord Sumner's words (*Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (3)), "a device by which the rules "as to absolute contracts are reconciled with a special exception "which justice demands." It is true that a contract, absolute in terms, may be absolute also in effect. The contractor, if he cannot perform, must pay damages. Prima facie, the actual language governs. But a contract absolute in terms, is not necessarily absolute in effect. It is in all cases a question of construction, as Lord Cranworth L.C. pointed out in *Couturier* v. *Hastie* (4), a case where under a contract for the sale of goods, the goods had perished at the date of the contract, both parties being then ignorant of the fact. Lord Cranworth said that, looking at the contract alone, what the parties contemplated, those who bought and those who sold, was that there was an existing something to be bought and sold at the time of the contract. The buyer could not be held liable for the price, or the seller for failure to deliver. The court having thus construed the contract, both parties were

(1) 3 B. & S. 826.
(2) (1647) Aleyn, 26.
(3) [1926] A. C. 497, 510.
(4) (1856) 5 H. L. Cas. 673, 681.

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held in the event to be discharged in law. This rule admits of clear and simple statement. This is done in s. 6 of the Sale of Goods Act, 1893. Sect. 7 deals with the analogous case of an agreement to sell specific goods. If they perish without any fault on the part of the seller or buyer, before the risk passes to the buyer the agreement is thereby avoided. In the same way, the general law as to impossibility or frustration might be stated in positive terms. It is a question of the construction of the particular contract, whether the obligation is absolute or whether it is qualified.

It is thus seen that the court is not claiming to exercise a dispensing power, or to modify or alter contracts. The parties did not express the qualification because they did not think of the possibility of the occurrence, but as Lord Watson said in *Dahl* v. *Nelson, Donkin & Co.* (1): "When one or other of "these possibilities becomes a fact, the meaning of the contract "must be taken to be not what the parties did intend (for they "had neither thought nor intention regarding it) but that "which the parties, as fair and reasonable men, would "presumably have agreed upon, if having such possibility in "view they had made express provision as to their several "rights and liabilities in the event of its occurrence." In short, in ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended, but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man. In Lord Sumner's words in *Hirji's* case (2): "An event occurs, not contemplated by "the parties and therefore not expressly dealt with in their "contract, which when it happens frustrates their object. "Evidently it is their common object that has to be frustrated "not merely the individual advantage which one party or "the other might have gained from the contract. If so, what "the law provides must be a common relief from this common "disappointment and an immediate termination of the "obligation as regards future performance. This is necessary, "because otherwise the parties would be bound to a contract,

(1) (1881) 6 App. Cas. 38, 59.
(2) [1926] A. C. 497, 507.

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"which is one that they did not really make. If it were not "so, a doctrine designed to avert unintended burdens would "operate to enable one party to profit by the event and to "hold the other, if he so chose, to a new obligation." Lord Sumner added (1) that "rights and wrongs which have already "come into existence, remain, and the contract remains, too, "for the purpose of giving effect to them."

I have quoted these statements of law to emphasize that the court is exercising its powers, when it decides that a contract is frustrated, in order to achieve a result which is just and reasonable. It would indeed be strange if it clogged its decision with the qualification which the Court of Appeal would impose, but which seems to me, as I shall seek to explain, inconvenient and unreasonable.

It does not seem to be here necessary to embark on the inquiry whether the doctrine of impossibility or frustration should be explained as based on an implied term or exception or on common mistake or some other principle. Lord Haldane in *Bank Line, Ld.* v. *Arthur Capel & Co.* (2) was disposed to regard the question as one of common mistake. That may be a reasonable explanation in cases where the parties intend to contract on the basis of something which, though they do not know it, has perished by causes beyond their control. But mistake cannot, I think, be extended to cover supervening impossibility or frustration, which is a different juristic concept. The explanation which has been generally accepted in English law is that impossibility or frustration depends on the court implying a term or exception and treating that as part of the contract. I may refer as instances of this to the language of Blackburn J. in *Taylor* v. *Caldwell* (3), of Lord Loreburn in *Tamplin's* case (4), and of Lord Sumner in the *Bank Line* case (5) and in *Hirji's* case (6). The legislature in s. 7 of the Sale of Goods Act simply stated the principle as a matter positivi juris. Whatever explanation is adopted, cannot affect the decision of this, or, so far as I can see, of any case. If

(1) [1926] A. C. 497, 507, 510.
(2) [1919] A. C. 435, 445.
(3) 3 B. & S. 826.
(4) [1916] 2 A. C. 397, 403.
(5) [1919] A. C. 435.
(6) [1926] A. C. 497.

the question is still open in English law, I should prefer to rest the principle simply on the true meaning of the contract as it appears to the court. The essential feature of the rule is that the court construes the contract, having regard both to its language, its nature and the circumstances, as meaning that it depended for its operation on the existence or occurrence of a particular object or state of things, as its basis or foundation. If that is gone, the life of the contract in law goes with it, at least as regards future performance. The contract remains only to enforce accrued rights. The explanation that the ground of the rule is an implied term or exception may, however, seem to bring the rule into line with the general jurisdiction of the court to imply in a contract terms which the parties have not expressed. This jurisdiction has recently been discussed by this House in *Luxor* (*Eastbourne*), *Ld.* v. *Cooper* (1). The parallel is indeed not exact, because the rule as to impossibility or frustration has peculiar and distinctive features of its own. It was, however, agreed in argument that the decision of this appeal cannot depend on what is the true explanation of the rule.

There is another aspect of the doctrine of frustration which I find it difficult to reconcile with the decision of the Court of Appeal. Frustration operates automatically. It does not depend on the choice or election of the parties to the contract. If the court holds that the meaning of the contract is such that its life is dependent on the existence or continuance in existence of a thing or state of things, and then finds in fact that the frustrating circumstance has come to pass because the thing or state of things has not existed at the date of the contract or has ceased to exist at some later material date, it follows by operation of law that the contract was either void to begin with or has become avoided, to use the language of ss. 5 and 6 of the Sale of Goods Act. This position must, accordingly, be distinguished from a somewhat analogous, but really quite different, position, which arises when a contract is terminated by the injured party, who rescinds it on the ground of a fundamental breach by the other party and who

(1) [1941] A. C. 108.

further claims damages for the breach while treating it as no longer binding for the future. Such a procedure involves a choice or option by the party who rescinds. But in the case of frustration the contract is ended and dead, simply by the frustrating event. If the parties choose to go on with it, that is in truth entering into a new contract. This is clearly stated by Lord Sumner in the passage I have quoted from *Hirji's* case (1). The position of the parties ought to be determined at once, and an indefinite suspense avoided. But this result is just what the decision of the Court of Appeal would prevent, because, according to the decision, it cannot be known whether there has been frustration in a legal sense unless and until it is proved affirmatively by one party or the other that the frustration was not brought into operation by his default.

Scott L.J. begins his judgment by referring to the fact that there were no exceptions in the charterparty relevant to the facts. That is true enough. The charter was wholly executory and the exceptions did not operate until the vessel was placed at the charterers' disposal which never took place. But that is not directly material on the question of frustration if the court is satisfied that the contract, though absolute in terms, is not absolute in fact. If, in virtue of the doctrine of frustration, the court holds that the contract is dissolved, the contract as to future performance is at an end and the exceptions go with it. Frustration, if it occurs, is an overriding event. Exceptions can only be relevant at an earlier stage in the controversy, because they may be inconsistent with the idea that the contract admitted of the doctrine of frustration being applied. This aspect was discussed by Lord Finlay, Lord Haldane and Lord Sumner in the *Bank Line* case (2). Exceptions, however, may be important at a late stage as excluding fault if the frustrating event was induced by what, apart from the exceptions, would be an actionable breach of contract. I need not further discuss that aspect here. There are no exceptions to be considered. Scott L.J. seems, however, to be leading up to the proposition that frustration is the only

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(1) [1926] A. C. 497.

(2) [1919] A. C. 435.

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possible defence, and then excluding it, not on the ground that the appellants cannot rely on their own fault if that had been proved, but on the ground that, though no fault was proved, they had not affirmatively proved absence of fault. I think that the Lord Justice is basing his decision on the view that affirmative proof of absence of fault is an essential part of the case of the party relying on frustration, so that, if he fails to establish it, there is no case to go to the jury even though in all other respects impossibility or frustration is established, as, in the present case, it is, indeed, admitted.

I have tried to find authority for the rule enunciated by the Court of Appeal, but have found none either in English or American cases or in the writings of eminent legal authors. Cases in which the courts have refused to give relief on the ground of frustration because the frustration was due to the fault of the promisor or of either party, or have considered the question, are very rare in the English reports. In the vast majority of cases, questions of responsibility do not arise. There is Lord Sumner's observation in the *Bank Line* case (1), where the facts did not raise the question. "I think it is "now well settled that the principle of frustration of an "adventure assumes that the frustration arises without blame "or fault on either side. Reliance cannot be placed on a "self-induced frustration; indeed, such conduct might give "the other party the option to treat the contract as repudiated." In *Mertens* v. *Home Freeholds Co.* (2), a builder was sued for damages for failing to complete a building which he had agreed to erect. He pleaded by way of defence that he was discharged from further performance by a refusal of the Minister of Munitions to give a licence to proceed under the Defence of the Realm Regulations existing in 1916. The defendant had applied for a licence, but it was refused because he had intentionally (as it was found), in order to get out of a losing contract, delayed in the work. It was held by the Court of Appeal, reversing the decision of the Divisional Court, that the defence failed. Lord Sterndale M.R., without any precise

(1) [1919] A. C. 452.

(2) [1921] 2 K. B. 526.

examination of the doctrine of frustration, proceeded on the broad common sense view that a man could not take advantage, by way of defence to an action for breach of contract, of circumstances as excusing him from further performance of the contract, if he had brought those circumstances about himself. Lord Sterndale observed that in *Taylor* v. *Caldwell* (1), if the defendant had burned down the music hall himself, he would not have been entitled to say that the subject-matter was gone and the contract frustrated. But it might be added that no one until now had gone so far as to decide or suggest that the defendant could not have relied on the destruction of the music hall unless he had affirmatively proved that he was not responsible for it and was not in fault. Lord Sterndale's conclusion followed from the facts proved, which showed actual fault on the part of the defendant.

In *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (2) a similar conclusion was reached. The case was somewhat peculiar. The defendants chartered the plaintiffs' trawler, but, it was held, on the basis that it could be used for trawling with the use of otter or similar trawling gear. That could not be done without a licence. A licence was refused because the defendants were not permitted to obtain licences for more than three trawlers, and had applied for and obtained licences for three trawlers of their own, thus making it impossible to obtain a licence for the plaintiffs' trawler. The Privy Council held that the defendants were liable. The result is shortly stated (3): ". . . . it was the appellants' own default which "frustrated the adventure; the appellants cannot rely on "their own default to excuse them from liability under the "contract." That was all that was necessary for the decision of the case. No question of onus of proof was raised because all the facts were before the court. Earlier in the judgment I had said (4) that "the essence of 'frustration' "is that it should not be due to the act or election of the "party," and had gone on to observe that Lord Sumner in

(1) 3 B. & S. 826.
(2) [1935] A. C. 524.
(3) [1935] A. C. 531.
(4) Ibid. 530.

Hirji's case (1) had quoted from *Dahl* v. *Nelson, Donkin & Co.* (2). Lord Blackburn's reference to frustration as a matter "caused "by something for which neither party was responsible," and again had quoted Brett J.'s words which postulate that one of the conditions of frustration is that it should be "without "any default of either party."

But for such expressions of opinion, it would be tempting to say that the more logical view might be that there are two elements to be considered: (1.) impossibility or frustration under the contract and the facts, and (2.) the causation of that impossibility or frustration, whether or not it is imputable to the fault of either party. The question has generally been approached from the point of view of a party relying on frustration as an excuse for failure to perform his contract, and obviously if frustration means not only that performance has become impossible but that neither party is responsible, there can be no frustration in that sense unless both conditions are fulfilled. It is that definition which English law seems to have accepted, and I think the Court of Appeal must have proceeded on it. But I can conceive a case in which the injured party, instead of electing to rescind on the ground of the other party's breach and claiming damages for a repudiation, might wish to rely on frustration as involving automatically the destruction of the contract and at the same time claim damages for the breach of contract which has frustrated and destroyed the contract, except so far as it remains alive to enforce rights accrued under it. So far as I know, such a case has never arisen, but logically it might be open, if the authorities have not excluded it. This way of looking at the matter might explain the reference to the fault of either party instead of the fault of the party relying upon the doctrine, though "either party" may simply mean "one party or the "other, if either is responsible." This view of the matter would obviously be fatal to the conclusion of the Court of Appeal, because there would then be two separate issues to be separately proved by the parties who severally raised the one or the other.

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(1) [1926] A. C. 497.

(2) 6 App. Cas. 38.

But I do not desire to decide the question in this appeal on that debatable or untenable ground. The appeal can, I think, be decided according to the generally accepted view that frustration involves as one of its elements absence of fault, by applying the ordinary rules as to onus of proof. If frustration is viewed (as I think it can be) as analogous to an exception, since it is generally relied on as a defence to a claim for failure to perform a contract, the same rule will properly be applied to it as to the ordinary type of exceptions. The defence may be rebutted by proof of fault, but the onus of proving fault will rest on the plaintiff. This is merely to apply the familiar rule which is applied, for instance, where a carrier by sea relies on the exception of perils of the seas. If the goods owner then desires to rebut that prima facie defence on the ground of negligence or other fault on the part of the shipowner, it rests on the goods owner to establish the negligence or fault.

Thus, on the view most favourable to the conclusion of the Court of Appeal I still reject it. In addition, the ordinary rule is that a man is not held guilty of fault unless fault is established and found by the court. This rule, which is sometimes described as the presumption of innocence, is no doubt peculiarly important in criminal cases or matters, but it is also true in civil disputes. Thus it was said in *Thomas* v. *Thomas* (1) by Wood V.-C., "possession is never considered "adverse if it can be referred to a legal title." I need not multiply citations for a principle familiar to lawyers. There is, for example, no presumption of fraud. It must be alleged and proved. So, also, of other wrongful acts or breaches of contract. If it is necessary, in order to defend a claim, to prove that it was a case of felo de se and not merely innocent suicide while of unsound mind, the full fact must be affirmatively proved. An illustration, perhaps more germane, is afforded by the rules as to the onus of proof in cases of unseaworthiness. If at the end of the case it is not ascertainable on the evidence that the real cause of the loss was unseaworthiness, the defence must fail. The maxim "respice finem"

(1) (1855) 2 K. & J. 79.

applies, though there may be provisional presumptions, shifting the onus of proof from time to time during the progress of the case. This is well illustrated in *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co., Ld.* (1), an action on a marine insurance policy for the loss of a ship which had sunk through causes not explained. The defence was that the ship was unseaworthy. The underwriters showed facts which raised a presumption in favour of unseaworthiness, and shifted at that stage the onus of proof, but at the end the court held that the real cause of the loss was unknown, that unseaworthiness was not proved and that the defence failed. In the same way, if negligence is alleged to override the defence of excepted perils, it must be alleged and proved affirmatively. If the matter is left in doubt when all the evidence has been heard, the party who takes on himself to affirm fault must fail. If what Scott L.J. meant was that the failure to tender the *Kingswood* to the charterers in time for the agreed adventure was a fundamental breach such that it could only be excused by affirmative proof of absence of fault, I cannot agree with him.

It is clear that the rule which the Court of Appeal laid down would in many cases work serious injustice and nullify the beneficial operation of the doctrine of frustration which has been somewhat empirically evolved with the object of doing what is reasonable and fair, as I have already explained. That the rule adopted by the Court of Appeal is inconvenient seems to me to be obvious. It is true that in many cases of frustration there is little or no room for human activity. As instances, I might mention earthquakes and unusual floods. In other cases there is little room for intervention by the parties, such as in case of governmental requisition or the refusal of a licence. But it cannot be that in any of these cases the party claiming that the contract is frustrated has to prove affirmatively that he has not caused or induced the frustration. Where natural forces have operated there may still be room for inquiry, but, if a ship is lost with all hands in a cyclone, must the shipowners establish affirmatively that the master did not receive and ignore warnings of the danger area? There may be many maritime losses in which evidence how they happened is impossible. If a ship is torpedoed with all hands, must the shipowner prove affirmatively absence of fault, such as that a light was not shown on the ship or that the ship obeyed the convoy regulations? In any case of unexplained sinking it may be impossible to exclude the possibility of fault on the part of the owner, as in the case of *Ajum Goolam* (1). But, indeed, the present is a sufficiently good illustration of an unprecedented and unexplained casualty where the real cause cannot be ascertained even after prolonged and exhaustive inquiry.

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(1) [1901] A. C. 362.

On the ruling of the Court of Appeal the shipowners have placed on them the unusual task of proving a negative. It is sought to say that the rule is not anomalous because of some other cases in which a party is required to prove a negative, but what are cited as parallels are so different and are so few in number as to emphasize the general rule. Thus, the law as to the liability of a bailee depends on the special obligation which the law has imposed on him from ancient times. It has recently been discussed by the Court of Appeal in *Brooks Wharf* v. *Goodman* (2). If the bailee fails duly to redeliver the goods, he must, in the absence of exceptions, show that he has taken reasonable care in keeping them. Similarly, the liability of a common carrier depends, according to the old law, on the custom of the realm, like that of the innkeeper. Under this special rule a carrier is an insurer who is absolutely liable for the safe carriage of the goods unless he can explain the loss as due to the act of God, the King's enemies, or inherent vice. In modern times the practice of having special contracts has been superimposed on the custom of the realm. These contracts contain exceptions. If the carrier pleads an exception, the goods owner may counter by pleading the fault of the carrier, but the onus of proving that, as also of proving an allegation of unseaworthiness, is, as I have already explained, on the goods owner who makes it. The provisions of the Merchant Shipping Act, 1894 (particularly ss. 502 and 503), which concede to a shipowner the rights by appropriate proceedings

(1) [1901] A. C. 362.

(2) [1937] 1 K. B. 538.

to limit the damages, for which he is otherwise responsible under the contract, to goods owners or passengers require as a condition of this privilege that he should show that the casualty happened without his actual fault or privity. All these and similar cases are obviously different and depend on special contracts or statutes. They do not give any support for the rule adopted by the Court of Appeal.

The Court of Appeal do not define what in this context is the meaning of "fault" or "default." In the Sale of Goods Act, 1893, the word "fault" (as used in ss. 6 and 7) is defined as meaning "wrongful act or default." That is not perhaps very helpful, but in *Sailing Ship Blairmore* v. *Macredie* (1) Lord Watson observed: "The rule of law applicable to "contracts is that neither of the parties can by his own act or "default defeat the obligations which he has undertaken to "fulfil." Willes J., in the passage already cited, gave as an instance of a party preventing performance the case of a man poisoning before delivery a horse which he had promised to deliver. Lord Sumner, in speaking of a self-induced frustration, has clearly in mind positive acts against the faith of the contract which amount to a repudiation and would justify rescission. This test would apply to *Mertens* v. *Home Freeholds Co.* (2), and to *Maritime National Fish Co. Line* v. *Ocean Trawlers* (3). On the other hand, mere negligence seems never to have been suggested as sufficient to constitute "fault" in this connection. In *Taylor* v. *Caldwell* (4), where the fire was described as accidental, no one suggested an inquiry whether any servant of the defendant had negligently caused the fire, and in the cases of personal incapacity defeating a contract for personal service, like *Poussard* v. *Spiers & Pond* (5), no investigation seems ever to have been suggested whether the party claiming to be excused was careful of his or her health. But even there a case of gross delinquency might perhaps be construed as amounting to a repudiation of the obligations of the contract. I do not here think it necessary to attempt the definition. This difficulty or absence of definition makes the rule enunciated by the Court of Appeal even more open to objection.

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(1) [1898] A. C. 593, 607.
(2) [1921] 2 K. B. 526, 607.
(3) [1935] A. C. 524.
(4) 3 B. & S. 826.
(5) (1876) 1 Q. B. D. 410.

In my opinion, this is a case in which it is found that there has been an unexplained casualty frustrating the contract. The real cause cannot be ascertained. No fault is shown against the appellants. I think that they are entitled to rely on the frustration as a defence to the claim. The judgment of the Court of Appeal should, in my opinion, be set aside, and that of Atkinson J. restored.

Lord Porter. My Lords, the material facts in the present cases can be stated very shortly. It appears that the appellants chartered their vessel the steamship *Kingswood* to the respondents to carry a cargo from Port Pirie in South Australia to a British port. On January 3, 1937, a few days after her arrival off Port Pirie but before she became an arrived ship, a violent and unexplained explosion took place on board. The immediate cause was a sudden opening of communication between the water and steam spaces in the donkey boiler with the result that that boiler was blown some one hundred and sixty-four feet forward through three bulkheads and the main boiler which faced it was set back some four or five feet. What caused the sudden opening was, however, a matter of speculation. Corrosion of the stay tubes, negligence in allowing the water in the boiler to get too low, and an initial explosion weakening the tubes were all suggested, but no satisfactory explanation was given. It was admitted, however, that the damage caused to the steamer by the explosion was such as to frustrate the commercial object of the adventure. In these circumstances the shipowners claimed that they were absolved from all further liability. The charterers, however, maintained that there had been a breach of contract for which the shipowners were liable in damages.

The dispute was referred to the arbitration of a commercial lawyer who issued an interim award in the form of a special case. His findings are set out in clauses 10, 11 and 12 of the case, which are as follows: "10. (1.) I am not satisfied that the "condition of the tubes contributed in any way to the disaster.

"On the other hand, I consider this theory to be possibly "correct and accordingly am not satisfied that the corroded "condition of the tubes did not contribute to the disaster. "(2.) I am not satisfied that any of the servants of the respondents [the present appellants] were guilty of any of the "negligence alleged. On the other hand, I consider the theory "to be possibly correct, and, accordingly, I am not satisfied "that negligence on the part of servants of the respondents "did not cause or contribute to the disaster. (3.) I consider "that this theory is the least probable of the three. I cannot "however say that it is impossible. If there was in fact "such an initial explosion it is impossible to say whether or "not the condition of the tubes contributed to the extent of the "disaster. 11. I am not satisfied that the true cause of the "disaster has as yet been suggested. 12. I am unable to find "either that there was any latent defect in the boiler not "discoverable by due diligence, or that, if there were such "defect, it caused or contributed to the disaster. No defect "was suggested except the thinness of the stay tubes, and this, "though examination was at all material times impracticable, "was capable of being inferred, and was in fact inferred, from "the leakages which had taken place."

The result of his finding is to leave it in doubt whether the shipowners were guilty of negligence or not. In this state of facts he made an award holding that the shipowners were liable to the charterers in damages, and an alternative award absolving them from liability in case the court should come to a different conclusion. The special case was set down for hearing before Atkinson J. who, after reviewing the authorities, rejected the arbitrator's conclusion and upheld the alternative award. From his decision the charterers appealed to the Court of Appeal who in a short judgment reversed the judge's decision. They thought the principle clear. In their view "A party prima "facie guilty of a failure to perform his contract cannot escape "under the plea of frustration unless he proves that the "frustration occurred without his default. There is no "frustration in the legal sense unless he proves affirmatively "that the cause was not brought into operation by his default."

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Your Lordships have to determine whether this statement accurately expounds one limitation of the doctrine of frustration.

Frustration is the term now in common use in cases in which the performance of a contract becomes impossible because its subject-matter has ceased to be available for the purpose for which both parties intended it to be used. The destruction of the subject-matter concerned, as in *Taylor* v. *Caldwell* (1), and *Appleby* v. *Myers* (2), or its requisition, as in *Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products, Ld.* (3), and *Bank Line, Ld.* v. *Capel & Co.* (4), are examples. So, indeed, are such cases as *Krell* v. *Henry* (5), where, it is true, the subject-matter of the hiring could have been used and paid for, but the underlying object for which one party had let and another had hired a room was that it should be used for the purpose of viewing a coronation procession, and, the procession having been abandoned, it was held that all further obligations under the contract had been determined. This extension, however, of the doctrine where the subject-matter of the contract is not itself destroyed, but the underlying purpose alone has been frustrated, is not here in question. The present is a simple case in which the subject-matter concerned has itself ceased to be available for performance of the contract and in principle closely resembles the position in *Jackson* v. *Union Marine Insurance Co.* (6) except that no question of fault there came in question.

The expression "frustration" itself comes, I think, from *Jackson* v. *Union Marine Insurance Co.* (6), where Bramwell B. (7) speaks of "an illness which would put an end in a business "sense to their business engagement and would frustrate the "object of that engagement," and again of "the voyage being "frustrated." But, though the phrase may not have been used until that date, the principle is old. The modern doctrine may be said to begin with *Taylor* v. *Caldwell* (1), where the destruction of a music hall to be used for holding a concert

(1) 3 B. & S. 826.
(2) L. R. 2 C. P. 651.
(3) [1916] 2 A. C. 397.
(4) [1919] A. C. 435.
(5) [1903] 2 K. B. 740.
(6) L. R. 10 C. P. 125.
(7) Ibid. 145, 148.

was held to put an end to a contract between the parties for its use for that purpose. In that case Blackburn J. points out that, as early as the reign of Queen Elizabeth, in the case of a personal contract, death put an end to the obligations of both parties: see *Hyde* v. *Dean of Windsor* (1). No doubt, the doctrine has been extended. Bramwell B., in the words just quoted, applied it to an illness sufficiently long, and the cases cited mark a further extension to meet the exigencies of a more complicated social life. But impossibility of performance by destruction of the subject-matter of the contract, whether that subject-matter be, as it originally was, a person, or later a thing, or later still the object for which that thing was by the intention of the parties to be used, is the foundation on which the doctrine depends.

The application, however, of the doctrine is limited to cases where the destruction occurs without the default of either party. This limitation is clearly expressed in the cases: see *Taylor* v. *Caldwell* (2); *Appleby* v. *Myers* (3); and *Bank Line, Ld.* v. *Capel & Co.* (4) per Lord Sumner. Indeed, there is some suggestion, the correctness of which it is not necessary to determine, that even in case of personal service the same limitation might be applicable: see per Martin B. in *Hall* v. *Wright* (5) and in the argument in *Boast* v. *Firth* (6). This limitation is admitted by both parties to exist in the present case. Their dispute is whether the defendant, to establish frustration, must prove that the subject-matter perished without his fault, or whether it is enough for him to prove that it has perished and he has not in fact been shown to be in fault.

If the words "without fault on either side" be strictly interpreted it would appear that the contract is not at an end unless neither party is in default. If the contract is prima facie put an end to by impossibility of performance, without further proof, and if that result is only avoided provided fault be proved in one party or the other, no difficulty arises, but if the view were to prevail that the party alleging frustration has

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(1) (1597) Cro. Eliz. 552, 553.
(2) 3 B. & S. 826, 832.
(3) L. R. 2 C. P. 659.
(4) [1919] A. C. 435, 452.
(5) (1859) E. B. & E. 765, 789.
(6) (1868) L. R. 4 C. P. 1, 5.

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to prove that neither party is in fault he would be in considerable difficulty. Not only would he have to prove that he was not in fault himself, but he would have to establish also that his opponent was not in fault, and, if he were unable to do so, he would have failed to prove frustration.

But I do not think the expression should be so strictly interpreted. Even in *Taylor* v. *Caldwell* (1) Blackburn J. speaks of the "perishing of the thing without default of the contractor" and, quoting Pothier: "The debtor corporis certi is freed "from his obligation when the thing has perished, neither by "his act, nor his neglect, and before he is in default." In *Robinson* v. *Davison* (2) Bramwell B. says "incapacity either "of body or mind in the performer without default on his or "her part is an excuse for non-performance," and in *Howell* v. *Coupland* (3) Blackburn J. says, "Of course, if the perishing "were owing to any default of the seller, that would be quite "another thing," while Quain and Archibald JJ. (4) speak of a cause over which the defendant has no control. Similar expressions can be found in the later cases, and I think that in all of them stress is laid, not on the freedom from blame of both parties, but on the fact that a party who has been in fault cannot rely on frustration due to his own wrongful act. If the meaning be that impossibility excuses performance the change of expression is comprehensible enough. It signifies only that the party in default cannot take advantage of his own wrong. It is a personal disqualification preventing him from taking advantage of a frustration which has automatically occurred, not a condition of its occurrence.

But whether the expression "without the default of either "party" or "without the default of the party alleging frustra-"tion" be used, the phrase itself contains some ambiguity. The limitation as expressed in the cases might mean either that frustration is only established provided the party relying on it prove both the destruction of the subject-matter of the contract and that he himself is not to blame, or it might mean that he succeeds provided he establishes the destruction unless

(1) 3 B. & S. 833, 835.
(2) (1871) L. R. 6 Ex. 269, 277.
(3) L. R. 9 Q. B. 462.
(4) Ibid. 467.

it be shown that he is in fault. Either interpretation is possible, whether one regards the principle of frustration as dependent on the implication of a term in the contract or due to the destruction of its subject-matter. If a term is to be implied, the question is what are the exact limits of the term. If the perishing of the substratum of the contract be relied on, it has still to be determined whether it must be established that that perishing was without fault of the parties. The words alone are inconclusive and in themselves are insufficient to establish the case of the appellants or the respondents. Some other reason must be found for preferring the one view to the other.

Each side claimed support for its argument in the fact that in no case has the present contention been put forward—the appellants saying that cases must have occurred in which the argument could have been used and the respondents that in all the decided cases the defendants were shown or admitted to be without fault. The only two instances in which the existence of fault of the party craving the assistance of the doctrine of frustration has been directly discussed have been those in which the party relying on the doctrine deliberately brought about the state of affairs which prevented the fulfilment of his contract: see *Mertens* v. *Home Freeholds Co.* (1) and *Maritime National Fish Co., Ld.* v. *Ocean Trawlers, Ld.* (2). In the former case a builder deliberately delayed his work so as to avoid the renewal of a licence necessary for its continuation, and in the latter the owners of certain trawlers who had let one on charter applied for the renewal of licences in respect of other vessels in preference to that so chartered. In the former Lord Sterndale M.R. said: "So far as I know it has never been "held that a man is entitled to take advantage of circumstances "as a frustration of the contract if he has brought those circum-"stances about himself," and in the latter Lord Wright says: "The essence of frustration is that it should not be due to "the act or election of the party." Then he quotes from Lord Sumner's opinion in *Bank Line, Ld.* v. *Arthur Capel & Co.* (3):

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(1) [1921] 2 K. B. 526.
(2) [1935] A. C. 524.
(3) [1919] A. C. 435, 452.

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"I think it is now well settled that the principle of frustration "of an adventure assumes that the frustration arises without "blame or fault on either side. Reliance cannot be placed "on a self-induced frustration."

I do not myself think that any guidance whereby the present difficulty can be resolved is to be obtained from these statements. Indeed, they apply only to deliberate acts and say nothing of the onus of proof or of the exact limits of the term to be implied. The appellants, however, also placed reliance on the analogy of those cases of personal obligation already referred to, in which the duty to perform depended on the continued existence of one of the parties and death supervened. In such cases, they said, it never had been necessary to prove and would be impossible for executors to prove that the deceased man's death was without his fault. That this view may be open to question appears from the observations of Martin B. in *Hall* v. *Wright* (1), and, though in *Williams* v. *Lloyd* (2) the plea as reported does not include an averment that the defendant was not in fault, the case, as often happens in the early reports, is very shortly stated, and the pleadings are not set out. Moreover, in any case, it may be doubted whether in the days of Queen Elizabeth death would have been considered as the fault of a party. It would, I think, have been regarded as an act of God. Even to-day I imagine that an accidental injury to a contractor preventing performance, though resulting from his own negligence, would be regarded as an accidental consequence or one of the ordinary incidents of life rather than as caused by the default of the party.

The main contention of the appellant, however, was that, in the first place, to compel a defendant to prove that he was not in fault would be to ask him to establish a negative (an onus that should not generally be placed on a party), and that, secondly, the ground on which a contract is held to be frustrated is the implication of a term which exempts the parties from further performance if the subject-matter of the contract perishes. This exemption, they say, is analogous to any other exception in a charterparty and prima facie frees them from liability though they may lose this protection if proved to be in fault. Support for this argument is to be found in the judgment of the court in *Jackson* v. *Union Marine Insurance Co., Ld.* (1), where the contract evidenced by a charterparty was held to be frustrated on the ground that it was subject to an implied term by which both parties were to be excused if, by reason of an excepted peril, it became impossible for the ship to arrive at her loading berth in time to perform the contemplated voyage. The effect of this implied term was treated as analogous to that of an express exception contained in the contract between the parties. If, it was argued by the appellants in the present case, the charterparty had contained an express exception, the carrier would on general principles have escaped liability without proof of anything other than facts bringing the exception into operation. Thereupon, the goods owner, to defeat the protection thus prima facie obtained, would have had to prove fault of some kind (e.g., negligence or unseaworthiness) which, in his submission, would prevent the carrier from taking advantage of the exception. If, then, the implied term frustrating the adventure be analogous to an express term, the contract would come to an end though the shipowner relied, not on an express, but an implied, term unless the charterer proved him in fault.

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(1) E. B. & E. 765.

(2) (1628) W. Jones, 179.

The respondents sought to meet this argument by the allegation that prima facie all contracts must be performed, however impossible, and for this proposition quoted the well known dicta in *Paradine* v. *Jane* (2) and in *Atkinson* v. *Ritchie* (3). I do not think this principle was universally applicable, even when these cases were decided. Moreover, neither *Paradine* v. *Jane* (2) nor *Atkinson* v. *Ritchie* (3) were cases of impossibility, and the observations in each were obiter.

The true principle seems to be, not that all contracts must prima facie be performed whether performance be possible or not, but that there are some contracts absolute in their nature

(1) L. R. 10 C. P. 125.

(2) Aleyn, 26.

(3) (1809) 10 East, 530.

where the promisor warrants the possibility of performance. These he is bound to perform in any event or to pay damages, but there are other cases where the promisor is only obliged to perform if he can. In a contract for personal performance where he dies, or in certain other cases where the subject-matter of the contract is destroyed, he cannot implement his promise. In such cases he is excused unless he be in fault. Of course, if he is in fault because his deliberate act has done away with the subject-matter of the contract, and, perhaps, if he has been negligent, he cannot recover. But prima facie he escapes. To make him liable his fault must be proved by the party which alleges that it destroys his excuse.

It has, I think, long been recognized that a particular contract may or may not impose an absolute undertaking on the promisor. In *Taylor* v. *Caldwell* (1) Blackburn J. says: "There seems no doubt that where there is a positive contract "to do a thing, not in itself unlawful, the contractor must "perform it or pay damages for not doing it, although, in "consequence of unforeseen accidents, the performance of his "contract has become unexpectedly burthensome or even "impossible. . . . But this rule is only applicable when the "contract is positive and absolute, and not subject to any con-"dition express or implied." So in *Howell* v. *Coupland* (2) Archibald J., arguendo, said: "No doubt, if the defendant has "made such an absolute contract he must abide by it, though "the performance has become impossible: *Jones* v. *St. John's* "*College, Oxford* (3). But is this an absolute contract?" Bowen L.J. in *Jacobs* v. *Credit Lyonnais* (4) and Willes J. in *Clifford* v. *Watts* (5) expressed similar opinions.

Where the promisor makes an absolute promise he takes the risk of his ability to fulfil his contract and must do so or pay damages. No question of frustration does or can arise. Whatever occurs the promisor is bound. The very fact, however, that in certain cases impossibility of performance is an excuse shows that in those cases there is no absolute promise. It is

(1) 3 B. & S. 833.
(2) L. R. 9 Q. B. 462.
(3) (1870) L. R. 6 Q. B. 115.
(4) (1884) 12 Q. B. D. 603.
(5) (1870) L. R. 5 C. P. 585.

conditional on something, i.e., the possibility of performance. If, then, in certain contracts the promisor need only fulfil his obligations if performance be possible and this be such a contract, there seems no valid reason for imposing on him the obligation of proving his innocence of fault. In truth, the words "without default on either side" are not used for the purpose of establishing what has to be proved by either party. Rather they are necessarily inserted to limit the cases to which the doctrine of frustration applies. If a party be in fault the doctrine is not to be invoked by him. If he is not in fault, it may be. But they have no bearing on the onus of proof. They qualify the doctrine; they do not impose on the party seeking to be excused the necessity of proving want of fault either in himself or in his opponent.

I have thought it unnecessary to trouble your Lordships with a discussion of the question whether a contractor should be held liable in a case where the impossibility on which he relies was due to his negligence only or whether some more deliberate act is required if the plea is to be defeated. In a recent text book (Salmond & Winfield on Contracts, p. 313) the principle is stated thus: "It must be understood that the "foregoing rules are formulated with respect to the case of "determination by frustration without any breach of the "contract on the part of either party. They are not applicable "in their full extent to contracts which are put an end to by the "breach of them by one of the parties, nor, therefore, to "contracts whose frustration is caused by a breach of con"tract. If the sinking of the steamship had been due to the "wilful act or negligence of the shipowners different consider"ations would have applied. The case would then have been "governed by the rule applicable to the rescission or deter"mination of a contract in consequence of the breach thereof "and not by the rules applicable to pure frustration not due to "the wrongful act of either party." This view was accepted by counsel for the appellants for the purposes of his argument. A contractor who negligently destroys the subject-matter of the contract is not free from blame and in some cases may not be within the exception "without default" as used in the

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cases, but I prefer to leave the question for determination until it comes directly in issue.

For the reasons I have stated I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Holman, Fenwick & Willan.*
Solicitors for respondents: *Parker, Garrett & Co.*

[HOUSE OF LORDS.]

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Nov. 3.

LIVERSIDGE . . . . APPELLANT;

AND

SIR JOHN ANDERSON AND ANOTHER . RESPONDENTS.

Emergency legislation—Detention of person—Belief of Secretary of State that person of hostile associations—Cause for belief—Powers of court—Defence (General) Regulations, 1939, *reg.* 18*B.*

Where the Secretary of State, acting in good faith under reg. 18B of the Defence (General) Regulations, 1939, makes an order in which he recites that he has reasonable cause to believe a person to be of hostile associations and that by reason thereof it is necessary to exercise control over him and directs that that person be detained, a court of law cannot inquire whether in fact the Secretary of State had reasonable grounds for his belief. The matter is one for the executive discretion of the Secretary of State.

Therefore, in an action by a person detained against the Secretary of State for damages for false imprisonment the court cannot compel the defendant to give particulars of the grounds on which he had reasonable cause to believe the plaintiff to be a person of hostile associations or that by reason of such hostile associations it was necessary to exercise control over the plaintiff. The production by the Secretary of State of an order of detention, made by him and ex facie regular and duly authenticated, constitutes a defence to such an action unless the plaintiff discharges the burden of establishing that the order is invalid:—

So *held*, affirming the decision of the Court of Appeal, Lord Atkin dissenting.

APPEAL from the Court of Appeal affirming an order of the King's Bench Division refusing the appellant's application for particulars of defence in an action by him against the Home Secretary for false imprisonment.

The appellant, who was detained by an order made by the respondent, Sir John Anderson, as Home Secretary, on May 26, 1940, under reg. 18B of the Defence (General) Regulations, 1939 (1), claimed by his writ a declaration that his detention in Brixton prison was unlawful. The appellant applied for particulars (*a*) of the grounds on which the respondent had reasonable cause to believe the appellant to be a person of hostile associations and (*b*) of the grounds on which the respondent had reasonable cause to believe that by reason of such hostile associations it was necessary to exercise control over the appellant. Master Moseley refused to make any order and that order was upheld by the judge in chambers, who, however, gave leave to appeal to the Court of Appeal. That court held that the appellant at the present stage was not entitled to any of the particulars he was claiming and the appeal was dismissed, but, having regard to the great importance of the questions arising out of orders for detention under reg. 18B of the Defence (General) Regulations, the appellant was given leave to appeal to this House.

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD MACMILLAN, LORD WRIGHT, and LORD ROMER.

Pritt K.C. and *G. O. Slade* for the appellant. The question is whether the Secretary of State has power under reg. 18B of the Defence Regulations to deprive the appellant of his liberty on the mere allegation that there is reasonable cause to believe certain things about him said to be prejudicial to the interests of the realm. In considering this the court must confine itself to the construction of the regulation, and the Secretary of State must satisfy the court that he had reasonable cause to believe what is alleged against the appellant, namely, hostile associations. In such a case the onus is on the respondent, and

(1) By Defence (General) Regulations, 1939, reg. 18B, para. (1.): "If the Secretary of State has "reasonable cause to believe any "person to be of hostile origin or "associations or to have been "recently concerned in acts pre-"judicial to the public safety or "the defence of the realm or in "the preparation or instigation of "such acts and that by reason "thereof it is necessary to exercise "control over him, he may make "an order against that person "directing that he be detained."

By para. (8.): "Any person "detained in pursuance of this "regulation shall be deemed to be "in lawful custody and shall be "detained in such place as may be "authorised by the Secretary of "State and in accordance with "instructions issued by him."

it is for the court to say whether on the evidence before it there was or was not reasonable cause to believe certain things alleged against the appellant. [LORD MACMILLAN. The court may in certain cases have to accept the decision of the Home Secretary.] In habeas corpus cases the court has required evidence of the facts and whether a good return has been made or not. The power conferred on the Home Secretary of interfering as he may with the liberty of the subject must be strictly construed, and, in the absence of compelling evidence, is to be construed in favour of the subject: see *Rex* v. *Halliday* (1) and *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria* (2). [VISCOUNT MAUGHAM. The Secretary of State may alone be in possession of the facts.] The regulations are designed to limit the powers of the Secretary of State. [LORD ROMER. If para. 8 of the regulation does not throw the onus on the appellant, of what use is it?] The Home Secretary must show that he had reasonable grounds for believing what he said he did, and we submit that he has not done so. The order should not be construed as meaning that, if the Home Secretary in his own opinion thinks that there is reasonable cause to act as he did, that is sufficient. When a person is detained against his will, justification for that step must be clearly established: see *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria* (2) where it was said that "it is the "duty of the courts to investigate the whole of the questions "raised and come to a judicial decision." In *Broughton* v. *Jackson* (3) it was held that in an action for false imprisonment on a criminal charge by a person not being a peace officer, mere belief of guilt is not sufficient justification, but facts must be shown on which the belief was grounded so that the court may judge whether or not the defendant had probable cause for making the arrest. See also *Green* v. *Garbutt* (4) and *Alman* v. *Oppert* (5) where, in an action against directors claiming compensation under the Directors Liability Act, 1890, in respect of alleged untrue statements in the company's prospectus, the defendants said that they bona fide believed the statements to be true and that they had reasonable grounds for their belief. In any interference with the liberty of the subject punctilious regularity must be observed. In *Cobbett* v. *Grey* (1) it was held that the removal of a person from one part of a prison to another without authority was a trespass. As was said in *Holroyd* v. *Doncaster* (2) "a party who took upon himself "to imprison another was prima facie guilty of a trespass, the "onus of justifying which rested entirely with himself."

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(1) [1917] A. C. 260.
(2) [1931] A. C. 662, 672.
(3) (1852) 18 Q. B. 378.
(4) (1912) 28 Times L. R. 575.
(5) [1901] 2 K. B. 576.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the respondent. Reg. 18B provides for orders to be made by the Secretary of State for the detention of certain persons for an undefined period. The appellant was detained by an order which is regular in point of form. If the appellant's contention is right, it will involve the substitution of the view of the court for the opinion of the Home Secretary. The admission or proof of an order ex facie regular as it is in this case is a complete answer to the claim for damages for false imprisonment. The contention on behalf of the appellant that a reasonable cause for the detention as a matter of law must be established is not well founded. We start with a detention under a regulation made by virtue of a statute, and no particular form is prescribed. The ground on which the Home Secretary can act is the fact of hostile associations of the person in question. In *Perryman* v. *Lister* (3) Kelly C.B. said that "what as a "matter of law is reasonable and probable cause for giving a "man into custody upon a charge of felony, or prosecuting a "man for any criminal offence at all, will be found to be a mere "question of opinion, depending entirely upon the view which "the judge may happen to take of the circumstances of each "particular case." That, we submit, is right. Here the Home Secretary had all the facts before him and on these he had reasonable cause to make the order he did. It was for him, and not for the court, to decide on the facts. As was said by Lord Finlay L.C. in *Rex* v. *Halliday* (4), "it seems obvious that no "tribunal for investigating the question whether circumstances

(1) (1849) 4 Ex. 729.
(2) (1826) 3 Bing. 492.
(3) (1868) L. R. 3 Ex. 197, 203.
(4) [1917] A. C. 260, 269.

"of suspicion exist warranting some restraint can be imagined "less appropriate than a court of law." No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The duty of deciding this question is thrown by the regulation on the Secretary of State and an advisory committee before whom the person affected can show any grounds why the order may be revoked or varied. If it had been intended that the persons in question could have recourse to the court it would have been quite unnecessary to set up the advisory committee procedure. The language used clearly shows that it is the Home Secretary who is to exercise his judgment. His act is an executive act, and it cannot be canvassed directly or indirectly in court. The responsibility remains with the executive. In *Rex* v. *Leman Street Police Station Inspector* (1) it was held that art. 12 of the Aliens Order, 1919, which empowered the Secretary of State "if he deems it to be conducive to the public good " to make a deportation order against an alien was not ultra vires, and that, in acting under it, the Secretary of State was not a judicial but an executive officer, and was, therefore, not bound to hold an inquiry or give the person against whom he proposed to make a deportation order the opportunity of being heard.

Pritt K.C. in reply. If it had been intended that a detention order should not be impugnable it would have been easy to insert a statement to that effect in the regulation. That was not done. The Home Secretary's powers are, therefore, limited.

The House took time for consideration.

1941. Nov. 3. VISCOUNT MAUGHAM. My Lords, by this appeal the appellant, so far as form is concerned, is seeking merely to have certain particulars from the defendants, the present Secretary of State for Home Affairs and his predecessor in that office, of their defence in an action of false imprisonment. The learned master, the judge in chambers (Tucker J.), and the Court of Appeal (MacKinnon, Luxmoore, and du Parcq L.JJ.) have all held that the appellant is not

(1) [1920] 3 K. B. 72.

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entitled to any of the particulars he claims. In such a case this House would not, generally speaking, entertain an appeal, but the circumstances are exceptional. The real object of the application is to raise at this early stage the vital question as to what onus, if any, lies on the respondents as defendants in the action in the circumstances of the case. The appellant is a person who was detained by an order made by Sir John Anderson as Home Secretary on May 26, 1940, under reg. 18B of the Defence (General) Regulations, 1939. The detention has been continued by the present Home Secretary. The validity of that detention has been raised in the action in which the appellant claims damages for false imprisonment, and consequential relief. Such an action used to be described as an action for trespass vi et armis. The general rule of law in these cases is well stated by Abbot C.J., delivering the judgment of the court in *Doswell* v. *Impey* (1). If, he says, persons having a limited authority " do any act *beyond* the "limit of their authority, they thereby subject themselves to "an action of trespass : but if the act done be *within* the limit "of their authority, although it may be done through an "erroneous or mistaken judgment, they are not thereby liable "to such action." The respondents rely on the order for the detention of the appellant above referred to. If it is valid, the action must clearly fail. The appellant, accordingly, seeks to throw on the respondents the burden of justifying the order. It will be convenient shortly to state the pleadings to show how, as a matter of pleading, the question of particulars arises.

The appellant (plaintiff) claimed by his writ dated March 14, 1941, a declaration that his detention in Brixton prison was and is unlawful, and damages for false imprisonment. Paragraph 2 of the statement of claim alleges that the first defendant was, and the second defendant now is, His Majesty's Home Secretary. Paragraphs 3, 4 and 6 of the statement of claim are as follows : "(3.) By a document dated May 26, 1940, and "expressed to be a detention order under reg. 18B of the "Defence (General) Regulations, 1939, the first-named defendant ordered and directed that the plaintiff be detained.

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(1) (1823) 1 B. & C. 163, 169.

"(4.) In consequence and by reason of the said order and "direction the plaintiff was on or about May 29, 1940, arrested, "and he has since been and still is detained and imprisoned at "H.M. Prison at Brixton. (6.) In the premises the defendants "have and each of them has caused and procured the unlawful "detention and imprisonment of the plaintiff and the second-"named defendant continues and intends to continue the "same." Paragraph 3 of the defence is: "The defendants "admit that the first-named defendant ordered that the "plaintiff should be detained under reg. 18B of the Defence "(General) Regulations, 1939," and para. 5 of the defence is: "None of the allegations contained in para. 6 of the statement of "claim is admitted. Save as above expressly admitted, none of "the allegations contained in the statement of claim is admitted."

It is desirable to state, so far as relevant, the Act of Parliament and the regulations under which the order for detention (or the document purporting to be such an order) was made. By s. 1, sub-s. 1, of the Emergency Powers (Defence) Act, 1939, it was provided that His Majesty by Order in Council "may make such regulations . . . . as appear to him to be "necessary or expedient for securing the public safety, the "defence of the realm, the maintenance of public order and the "efficient prosecution of any war in which His Majesty may "be engaged, and for maintaining supplies and services "essential to the life of the community." By sub-s. 2 it was enacted that "without prejudice to the generality of the "powers conferred by the preceding sub-section, Defence "Regulations may, so far as appears to His Majesty in Council "to be necessary or expedient for any of the purposes mentioned "in that sub-section" make provision for a number of important purposes including regulations "for the detention of "persons whose detention appears to the Secretary of State "to be expedient in the interests of the public safety or the "defence of the realm." The regulations authorized by the Act are clearly of the widest possible character and may affect not only the liberty but also the property of all subjects, with a certain limit as regards authorizing conscription and as to extending the powers of courts-martial (sub-s. 5). The

Emergency Powers (Defence) Act, 1940, gives even greater powers to the Crown. It was under the provisions of the Act of 1939 that the Defence (General) Regulations, 1939, were made, and they have been from time to time amended.

Regulation 18B of the Defence (General) Regulations, 1939, referred to in para. 3 of the statement of claim, and in para. 3 of the defence, is in the following terms: "If the Secretary "of State has reasonable cause to believe any person to be of "hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence "of the realm or in the preparation or instigation of such acts "and that by reason thereof it is necessary to exercise control "over him, he may make an order against that person directing "that he be detained." That is the material sub-section in the present case.

The regulation continues thus: "(1A.) If the Secretary of "State has reasonable cause to believe any person to have been "or to be a member of, or to have been or to be active in the "furtherance of the objects of, any such organization as is "hereinafter mentioned, and that it is necessary to exercise "control over him, he may make an order against that person "directing that he be detained. The organizations hereinbefore "referred to are any organization as respects which the "Secretary of State is satisfied that either (*a*) the organization "is subject to foreign influence or control, or (*b*) the persons "in control of the organization have or have had associations "with persons concerned in the government of, or sympathies "with the system of government of, any Power with which "His Majesty is at war, and in either case that there is danger "of the utilization of the organization for purposes prejudicial "to the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war "in which His Majesty may be engaged, or the maintenance of "supplies or services essential to the life of the community.

"(2.) At any time after an order has been made against any "person under this regulation, the Secretary of State may "direct that the operation of the order be suspended subject "to such conditions: (*a*) prohibiting or restricting the "possession or use by that person of any specified articles; "(*b*) imposing upon him such restrictions as may be specified "in the direction in respect of his employment or business, in "respect of the place of his residence, and in respect of his "association or communication with other persons; (*c*) "requiring him to notify his movements in such manner, at "such times, and to such authority or person as may be so "specified; (*d*) prohibiting him from travelling except in "accordance with permission given to him by such authority "or person as may be so specified, as the Secretary of State "thinks fit; and the Secretary of State may revoke any such "direction if he is satisfied that the person against whom the "order was made has failed to observe any condition so imposed, "or that the operation of the order can no longer remain "suspended without detriment to the public safety or the "defence of the realm.

"(3.) For the purposes of this regulation, there shall be one "or more advisory committees consisting of persons appointed "by the Secretary of State; and any person aggrieved by the "making of an order against him, by a refusal of the Secretary "of State to suspend the operation of such an order, by any "condition attached to a direction given by the Secretary "of State or by the revocation of any such direction, under the "powers conferred by this regulation, may make his objections "to such a committee.

"(4.) It shall be the duty of the Secretary of State to secure "that any person against whom an order is made under this "regulation shall be afforded the earliest practicable opportunity of making to the Secretary of State representations in "writing with respect thereto and that he shall be informed of "his right, whether or not such representations are made, to make "his objections to such an advisory committee as aforesaid.

"(5.) Any meeting of an advisory committee held to consider "such objections as aforesaid shall be presided over by a "chairman nominated by the Secretary of State and it shall be "the duty of the chairman to inform the objector of the "grounds on which the order has been made against him and to "furnish him with such particulars as are in the opinion of "the chairman sufficient to enable him to present his case.

"(6.) The Secretary of State shall make a report to Parlia-"ment at least once in every month as to the action taken "under this regulation (including the number of persons "detained under orders made thereunder) and as to the "number of cases, if any, in which he has declined to follow "the advice of any such advisory committee as aforesaid.

"(7.) If any person fails to comply with a condition attached "to a direction given by the Secretary of State under para. (2.) "of this regulation that person shall, whether or not the "direction is revoked in consequence of the failure, be guilty "of an offence against this regulation.

"(8.) Any person detained in pursuance of this regulation "shall be deemed to be in lawful custody and shall be detained "in such place as may be authorized by the Secretary of State "and in accordance with instructions issued by him."

On April 29, 1941, the appellant applied to the master in chambers (inter alia) for the following particulars, namely, particulars in writing of the allegation in para. 3 of their defence that the first-named defendant ordered that the plaintiff should be detained under reg. 18B of the Defence (General) Regulations, 1939: (*a*) of the grounds upon which the first-named defendant had reasonable cause to believe the plaintiff to be a person of hostile associations; and (*b*) of the grounds upon which the first-named defendant had reasonable cause to believe that by reason of such hostile associations it was necessary to exercise control over the plaintiff. On May 8, 1941, Master Moseley heard the application and refused to make any order thereon. The appellant appealed from the said refusal and on May 23, 1941, Tucker J., sitting as judge in chambers, dismissed the appeal, but gave the appellant leave to appeal to the Court of Appeal. The appellant appealed to the Court of Appeal and the appeal was heard before MacKinnon, Luxmoore and du Parcq L.JJ. on June 11 and 12, 1941. The judgment of the court was delivered by MacKinnon L.J. It was held by the court that on the detention order being proved or admitted the onus was on the appellant to prove that the order was invalid. It should be mentioned

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that the good faith of the Secretary of State is not challenged. The judgment proceeded as follows: "Put in another way, "if the plaintiff admits, or it is proved, that the plaintiff was "detained by an order purporting or expressed to be issued "under the regulation, and duly signed as such, the burden "is on the plaintiff, if he is to claim damages for false imprisonment, to give evidence showing that the order was invalid. "As the case proceeds at the hearing, as often happens, the "onus of proof may be shifted. If the plaintiff adduces "evidence which goes to show the invalidity of the order, "that might happen. If, upon that happening, the defendants "produced evidence which was embarrassing to the plaintiff, "by way of surprise or novelty, the judge would no doubt "protect him by way of adjournment. Conceivably, in a "proper case, the judge might at that stage make some order "by way of particulars of the allegations of the defendants. "These, however, are but hypothetical considerations as to "possible developments at a later stage of the litigation. "At this stage we are quite clear that the plaintiff is wrong "in his proposition as to the burden of proof inherently resting "upon himself and upon the defendants respectively." On this view it naturally followed that the appellant at the present stage was not entitled to any of the particulars he is claiming, and the appeal was dismissed. Having regard to the great importance of the questions arising out of orders for detention under reg. 18B of the Defence (General) Regulations, the appellant was given leave to appeal to your Lordships' House on July 21, 1941.

The Court of Appeal in October, 1940, had had to consider the true meaning of reg. 18B, para. (1.), in an analogous case entitled *Rex* v. *Secretary of State for Home Affairs. Ex parte Lees* (1). That was an application for a writ of habeas corpus by Mr. Lees who had been detained by an order of the Home Secretary, Sir John Anderson, under reg. 18B. Sir John Anderson in that case had made an affidavit stating that he had received and considered reports and information from persons in responsible positions who were experienced in

(1) [1941] 1 K. B. 72.

investigating matters of the kind under consideration and whose duty it was to report to him confidentially, that he had studied the reports and come to the conclusion that there were clear grounds for believing, and he did in fact believe, that Mr. Lees was a member of such an organization (stating the effect of the affidavit shortly) as is defined in reg. 18B (1A). The Court of Appeal then decided that the court could not act as a court of appeal from the decision of the Secretary of State and that his affidavit proved to the satisfaction of the court that he had reasonable cause to believe, and did honestly believe, the matters in question, and, that being so, the order was validly issued. As I understand the judgment in the *Lees* case it negatived the idea that the court had any power to inquire into the grounds for the belief of the Secretary of State (his good faith not being impugned) or to consider whether there were grounds on which he could reasonably arrive at his belief.

The Court of Appeal in the present case was, therefore, precluded by the previous decision from considering the main point argued before your Lordships, namely, the question whether there were in fact reasonable grounds for the beliefs (*a*) that the appellant was a person of hostile associations and (*b*) that by reason thereof it was necessary to exercise control over him. In this case, however, the Secretary of State who made the order and his successor in office have not made any affidavit in the action, and the appellant, therefore, is entitled to contend, and does contend, that the mere production of an order signed by the Secretary of State is not a sufficient prima facie defence to the action of false imprisonment and that an onus lies on the respondents to give evidence at the trial to prove that Sir John Anderson had reasonable grounds for the belief recited in the order. That order (following the language of the regulation) is in the following terms:

"DEFENCE (GENERAL) REGULATIONS, 1939.

"DETENTION ORDER.

"Whereas I have reasonable cause to believe Jack Perlzweig "alias Robert Liversidge to be a person of hostile associations "and that by reason thereof it is necessary to exercise control "over him: Now, therefore, I, in pursuance of the power "conferred on me by reg. 18B of the Defence (General) "Regulations, 1939, hereby make the following order: I "direct that the above-mentioned Jack Perlzweig alias Robert "Liversidge be detained.

"(Signed) John Anderson,
"One of His Majesty's Principal Secretaries of State."

This point as to the evidence is perhaps not directly relevant on the question of particulars, but it was raised and dealt with in the Court of Appeal, and both sides have desired your Lordships to express your opinion on it. I propose, first, to deal with the important question of the construction of the words in the regulation, "If the Secretary of State has "reasonable cause to believe, etc." that is, the question whether, as the appellant contends, the words require that there must be an external fact as to reasonable cause for the belief, and one, therefore, capable of being challenged in a court of law, or whether, as the respondents contend, the words, in the context in which they are found, point simply to the belief of the Secretary of State founded on his view of there being reasonable cause for the belief which he entertains. Secondly, I shall express my opinion on the question (which strictly speaking would not arise till the trial) whether the order of the Secretary of State is in the circumstances sufficient prima facie proof that the Secretary of State has acted lawfully and that the detention of the appellant was and is accordingly not illegal.

Before dealing with the construction of the regulation, it is desirable to consider how the matter should be approached. The appellant's counsel truly say that the liberty of the subject is involved. They refer in emphatic terms to Magna Carta and the Bill of Rights, and they contend that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown. Adopting the language of Lord Finlay L.C. in this House in the case of *Rex* v. *Halliday* (1), I hold that the suggested

(1) [1917] A. C. 260, 270.

rule has "no relevance in dealing with an executive measure "by way of preventing a public danger" when the safety of the state is involved. The language of the Act of 1939 (above cited) shows beyond a doubt that Defence Regulations may be made which must deprive the subject "whose detention "appears to the Secretary of State to be expedient in the "interests of the public safety" of all his liberty of movement while the regulations remain in force. There can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend (as the terms of the Act indeed suggest) on the unchallengeable opinion of the Secretary of State. The legislature obviously proceeds on the footing that there may be certain persons against whom no offence is proved nor any charge formulated, but as regards whom it may be expedient to authorize the Secretary of State to make an order for detention. The only safeguards, if they be safeguards, is that detention "appears to the "Secretary of State to be expedient in the interests of the "public safety or the defence of the realm," and that he himself is subject to the control of Parliament. It should be added, that as in *Halliday's* case (1), the power with which we are here concerned is to take preventive measures in the nature of internment which will last only for a limited time: see s. 11 of the Act. There is no charge against the appellant.

My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention. My Lords, I am not disposed to deny that, in the absence of a context, the prima facie meaning of such a phrase as "if A.B. has reasonable cause to believe" a certain circumstance

(1) [1917] A. C. 260.

or thing, it should be construed as meaning "if there "is in fact reasonable cause for believing" that thing and if A.B. believes it. But I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that, if the thing to be believed is something which is essentially one within the knowledge of A.B. or one for the exercise of his exclusive discretion, the words might well mean if A.B. acting on what he thinks is reasonable cause (and, of course, acting in good faith) believes the thing in question. FOR H.S

In the present case there are a number of circumstances which tend to support the latter conclusion.

First, reg. 18B, paras. (I.) and (IA), alike require the Secretary of State to have reasonable cause to believe two different things. Taking the first paragraph, he must, in the first place, believe the person (*a*) to be of hostile origin or associations, or (*b*) to have been recently concerned in acts prejudicial to the public safety or the defence of the realm, or (*c*) in the preparation or instigation of such acts, or (*d*) to have been or to be a member of, or (*e*) to be active in the furtherance of the objects of organizations which are carefully defined by reference to the personal decision of the Home Secretary. Any one of these various circumstances is sufficient to satisfy the first fact which the Secretary of State must believe, and I do not doubt that a court could investigate the question whether there were grounds for a reasonable man to believe some at least of those facts if they could be put before the court. But then he must at the same time also believe something very different in its nature, namely, that by reason of the first fact, "it is necessary to exercise "control over" the person in question. To my mind this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law. If, then, in the present case the second requisite, as to the grounds on which the Secretary of State

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are you
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can make his order for detention, is left to his sole discretion without appeal to a court, it necessarily follows that the same is true as to all the facts which he must have reasonable cause to believe.

Secondly, it is admitted that the Home Secretary can act on hearsay and is not required to obtain any legal evidence in such a case, and clearly is not required to summon the person whom he proposes to detain and to hear his objections to the proposed order. Since the Home Secretary is not acting judicially in such a case, it would be strange if his decision could be questioned in a court of law.

Thirdly, and this is of even greater importance, it is obvious that in many cases he will be acting on information of the most confidential character, which could not be communicated to the person detained or disclosed in court without the greatest risk of prejudicing the future efforts of the Secretary of State in this and like matters for the defence of the realm. A very little consideration will show that the power of the court (under s. 6 of the Act) to give directions for the hearing of proceedings in camera would not prevent confidential matters from leaking out, since such matters would become known to the person detained and to a number of other persons. It seems to me impossible for the court to come to a conclusion adverse to the opinion of the Secretary of State in such a matter. It is beyond dispute that he can decline to disclose the information on which he has acted on the ground that to do so would be contrary to the public interest, and that this privilege of the Crown cannot be disputed. It is not ad rem on the question of construction to say in reply to this argument that there are cases in which the Secretary of State could answer the attack on the validity of the order for detention without raising the point of privilege. It is sufficient to say that there must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature. That must have been plain to those responsible in advising His Majesty in regard to the Order in Council, and it constitutes, in my opinion, a very cogent reason for thinking that the words under discussion cannot

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be read as meaning that the existence of "reasonable cause" is one which may be discussed in a court which has not the power of eliciting the facts which in the opinion of the Secretary of State amount to "reasonable cause."

Fourthly, it is to be noted that the person who is primarily entrusted with these most important duties is one of the principal Secretaries of State, and a member of the government answerable to Parliament for a proper discharge of his duties. I do not think he is at all in the same position, as, for example, a police constable. It is not wholly immaterial to note that the Secretary of State is provided with one or more advisory committees (para. (3.)), and that he has to report to Parliament at least once in every month as to the action taken by him and the orders he has made, and as to the number of cases in which he has declined to follow the advice of the advisory committee (para. (6.)). These provisions seem to point to the fact that the Secretary of State will be answerable to Parliament in carrying out duties of a very important and confidential nature. I have heard no explanation of the circumstance that no express provisions are made in the regulation as to an appeal from the Secretary of State's decision unless it is the fact that no such appeal was intended. It seems to me that, if any such appeal had been thought proper, it would have been to a special tribunal with power to inquire privately into all the reasons for the Secretary's action, but without any obligation to communicate them to the person detained. The objections to an appeal in a case of mere suspicion and in time of war are not far to seek, but, however that may be, an application to the High Court, with power to the judge to review the action of the Secretary of State, seems to be completely inadmissible, and I am unable to see that the words of the regulation in any way justify the conclusion that such a procedure was contemplated.

The main argument for the appellant, apart from the contention as to the principle of construction applicable to a case where the liberty of the subject is concerned which I have already dealt with, is based on the difference of language used as regards the belief of the Secretary of State in different sections of the regulations, and, indeed, in different parts of reg. 18B. Thus it is pointed out that in several places and in particular in reg. 18B, para. (1A.), the Secretary of State is only required to be "satisfied" of something: see, for example, regs. 2D and 18A, para. (1.). In these cases it is conceded that there is no recourse to the court provided, of course, that the Secretary of State acts in good faith. The different phrase "has reasonable cause to believe" points, it is said, to a different standard and a different meaning. (For examples see regs. 1A, 2C, para. (2.), and 18B.). It is added that the present reg. 18B is not the original regulation, but a new regulation (see St. R. & O. 1939, No. 1681, bearing date November 23) replacing the words in the original clause, which ran thus: "The Secretary of State, if satisfied with "respect to a particular person, that with a view to preventing "him acting in any manner prejudicial to the public safety "or the defence of the realm, it is necessary so to do may" (inter alia) "make an order directing that he be detained." It is apparent that this is an earlier and not very perfect attempt at the present regulation which entirely supersedes it.

These considerations are not without weight, though three observations fall to be made. The first is that Orders in Council making regulations pursuant to an Act of Parliament do not in general receive the same attention and scrutiny as statutes, and it is important to remember that, though they may be annulled, they cannot be amended in either House (see s. 8 of the Act), so that errors in language, if detected, cannot be corrected. There are, of course, no three readings and no committee stage in either House. In my opinion, it would be a mistake to attribute the same force to an alteration of language in an amending Order in Council as in an amending statute. The second observation is that even in statutes changes of words often occur without a change of meaning. The third observation is that the words "has reasonable cause "to believe" are not without a probable meaning. It may well have been thought desirable to draw the attention of the Secretary of State to the fact that in certain cases, and, in particular, in cases in which he was considering the serious step of depriving a person of his liberty for an uncertain period, he must himself have considered whether there was reasonable cause for forming the belief which would justify his action. On the other hand, I suppose he might be "satisfied" of some fact by the report of one of his subordinates in whom he placed complete confidence.

Apart, however, from these considerations, I am of opinion that the arguments above enumerated in favour of the construction for which the Attorney-General contends must greatly outweigh any arguments which your Lordships have heard on the other side and that his construction must prevail. The result is that there is no preliminary question of fact which can be submitted to the courts and that in effect there is no appeal from the decision of the Secretary of State in these matters provided only that he acts in good faith. It follows, and it is not disputed by the appellant's counsel, that on this view the application for particulars must fail.

I can deal much more shortly with the question whether an onus is thrown on the first respondent, the Secretary of State who made the order for detention, to give evidence to show that he had reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The order on its face purports to be made under the regulation and it states that the Secretary of State had reasonable cause to believe the facts in question. In my opinion, the well known presumption omnia esse rite acta applies to this order, and, accordingly, assuming the order to be proved or admitted, it must be taken prima facie, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with. It will be noted that on the view I have expressed as to the construction of the regulation it is the personal belief of the Secretary of State that is in question, and that, if the appellant's contention on this point were correct, the same question would arise in the numerous cases where an executive order depends on the Secretary of State or some other public officer being "satisfied" of some fact or circumstance. It has never,

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I think, been suggested in such cases that the Secretary of State or public officer must prove that he was so "satisfied" when he made the order. Just as the fact that the act of the Secretary of State acting in a public office is prima facie evidence that he has been duly appointed to his office, so his compliance with the provision of the statute or the Order in Council under which he purported to act must be presumed unless the contrary is proved. There are scores of instances of such presumptions to be found in the books, none I think precisely in point, but many in which the principle was less necessary on the score of public convenience than the present. If an instance is required it may be found in the rule that where local authorities have made a rate under an Act, compliance with the formalities required by that Act will be presumed until the contrary is shown: *Reg.* v. *Reynolds* (1).

I shall not take up your Lordships' time by dealing with the various recent cases relating to these detention orders which were quite properly cited to your Lordships, for the reason that they have all been considered and examined at length by Scott L.J. and Goddard L.J. in the recent case of *Rex* v. *Secretary of State for Home Affairs. Ex parte Greene* (2), and I could not usefully add anything to what they have said.

In my opinion, the present appeal should be dismissed with costs and I move your Lordships accordingly.

NB DISSENTING :

LORD ATKIN. My Lords, I have prepared an opinion which is applicable both to this case and to that of *Greene* v. *Secretary of State for Home Affairs* (3).

These cases raise the issue as to the nature and limits of the authority of the Secretary of State to make orders that persons be detained under reg. 18B of the Defence (General) Regulations, 1939. The matter is one of great importance both because the power to make orders is necessary for the defence of the realm, and because the liberty of the subject is seriously infringed, for the order does not purport to be made for the commission of an offence against the criminal

(1) [1893] 2 Q. B. 75.
(2) [1942] 1 K. B. 87.
(3) Post, p. 284.

law. It is made by an executive minister and not by any kind of judicial officer, it is not made after any inquiry as to facts to which the subject is party, it cannot be reversed on any appeal, and there is no limit to the period for which the detention may last. The material words of the regulation are as follows: "If the Secretary of State has reasonable "cause to believe any person to be of hostile origin or "associations and that by reason thereof it is necessary to "exercise control over him, he may make an order against "that person directing that he be detained." They are simple words and as it appears to me obviously give only a conditional authority to the minister to detain any person without trial, the condition being that he has reasonable cause for the belief which leads to the detention order. The meaning, however, which for the first time was adopted by the Court of Appeal in the *Greene* case and appears to have found favour with some of your Lordships is that there is no condition, for the words "if the Secretary of State has "reasonable cause" merely mean "if the Secretary of State "thinks that he has reasonable cause." The result is that the only implied condition is that the Secretary of State acts in good faith. If he does that—and who could dispute it or disputing it prove the opposite?—the minister has been given complete discretion whether he should detain a subject or not. It is an absolute power which, so far as I know, has never been given before to the executive, and I shall not apologize for taking some time to demonstrate that no such power is in fact given to the minister by the words in question.

It is a curious fact that in both cases in the first emergence of the issues raised no trace of this contention appeared. In the *Liversidge* case the only question raised is in an action for false imprisonment brought by the appellant. Following on a defence setting up detention under an order of the Secretary of State the appellant asked for particulars of the reasonable cause. The only question raised on the summons before the judge in chambers was on the onus of proof, and, as both courts held that the onus was on the appellant to show that there was no reasonable cause, the order for particulars was refused. It is apparent that if at that time the courts had accepted the present construction no question of onus would have arisen, for no issue as to the actual existence of reasonable cause could arise. In the *Greene* case the application was by summons for a writ of habeas corpus. The Divisional Court took the same view of the onus as was adopted in the *Liversidge* case, and held that in view of the Secretary of State's affidavit in answer to the appellant's evidence the court was not satisfied that there had been no reasonable cause. These matters became irrelevant on the construction adopted by the Court of Appeal on appeal in *Greene's* case. The view there taken was that the words "reasonable cause" cannot "properly be construed as imposing "an objective condition precedent of fact on which a person "detained would be entitled to challenge the grounds for the "Secretary of State's honest belief: in short, that the condition "is subjective not objective." This view of the case at once disposed of any objection to the different grounds adopted by the Divisional Court, and is of such overwhelming importance compared with the issues raised in both cases up to that point that I proceed at once to deal with it, reserving till later what has to be said on the original onus.

It is surely incapable of dispute that the words "if A has "X" constitute a condition the essence of which is the existence of X and the having of it by A. If it is a condition to a right (including a power) granted to A, whenever the right comes into dispute the tribunal whatever it may be that is charged with determining the dispute must ascertain whether the condition is fulfilled. In some cases the issue is one of fact, in others of both fact and law, but in all cases the words indicate an existing something the having of which can be ascertained. And the words do not mean and cannot mean "if A thinks that he has." "If A has a broken ankle" does not mean and cannot mean "if A thinks that he has a broken "ankle." "If A has a right of way" does not mean and cannot mean "if A thinks that he has a right of way." "Reasonable cause" for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights, then ordinarily the reasonableness of the cause, and even the existence of any cause is in our law to be determined by the judge and not by the tribunal of fact if the functions deciding law and fact are divided. Thus having established, as I hope, that the plain and natural meaning of the words "has reasonable cause" imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed, I proceed to show that this meaning of the words has been accepted in innumerable legal decisions for many generations, that "reasonable cause" for a belief when the subject of legal dispute has been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal. I will go further and show that until June or July of this year in connection with this reg. 18B, there never has been any other construction even submitted to the courts in whatever context the words are found.

The power of arrest is confided by the common law both to constables and to private individuals. The constable has power within his district to arrest a person on reasonable suspicion of his having committed a felony. The private individual has power on two conditions: (1.) that a felony has actually been committed; (2.) that there is reasonable and probable cause of suspecting the person arrested. In these cases the grounds for suspicion must be brought before the court, the onus is on the person who arrested to prove the reasonable grounds, and the issue whether the cause is reasonable or not is to be determined by the judge. These propositions will be found in any elementary text book. I will refer to authority that the defendant in an action for false imprisonment based on unlawful arrest is entitled to succeed if he pleads and proves that the imprisonment was legally justifiable: *Allen* v. *Wright* (1); that he must show the cause of suspicion so that the court may judge of the reasonableness: *Mure* v. *Kaye* (2); *Stammers*

(1) (1838) 8 C. & P. 522.

(2) (1811) 4 Taunt. 34.

v. *Yearsley* (1); *Haynes* v. *Mewis* (2); that a man directing a constable to act on a suggestion of felony is bound to show probable cause of suspicion: *M'Cloughan* v. *Clayton* (3); that the plea must show reasonable and probable ground of suspicion, i.e., facts which raise a reasonable suspicion, not all the evidence (per Lord Campbell C.J.), and it is for the court to say whether the facts pleaded show reasonable cause (per Wightman J.): *Broughton* v. *Jackson* (4); that it is a good plea that the man was arrested on a reasonable suspicion of felony, but not enough that the suspicion was bona fide: *Sayer* v. *Lichfold* (5); that the civilian defendant must make out a reasonable ground of suspicion and that a felony has actually been committed (per Lord Tenterden C.J.): *Beckwith* v. *Philby* (6); and a more recent affirmation of the same principles in *Wallace* v. *W. H. Smith and Son, Ld.* (7). In all these cases it is obvious that the courts were dealing with an objective fact to be proved before them by the defendant, and that their pronouncements would be nonsense if the inquiry had only been whether the defendant believed that he had reasonable ground.

So much for the constable's power of arrest at common law. He and other persons have also been armed with powers of arrest by statute and in all cases the condition of reasonable cause for suspicion has been enacted. I select a list of thirteen statutes from the valuable work on Police Law by Dr. Moriarty, the late chief constable of Birmingham, 6th ed., pp. 16, seq.

"Aliens Restriction Acts, 1914 and 1919, Aliens Order, 1920, "art. 19: Any person who acts in contravention of this Order "or is reasonably suspected of having so acted may be arrested "without warrant by any constable."

"Diseases of Animals Act, 1894, s. 43: A constable may stop "and detain any person . . . . reasonably suspected of being "engaged in committing an offence against the Act . . . ."

"Army Act, 1881, s. 154: On reasonable suspicion a deserter "or absentee without leave may be arrested without warrant."

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(1) (1833) 10 Bing. 35.

(2) (1826) 5 L. J. (O.S.) K.B. 47.

(3) (1816) Holt N. P. 478.

(4) (1852) 21 L. J. (Q. B.) 265, 267, 268.

(5) (1854) 23 L. T. (O. S.) 324.

(6) (1827) 6 B. & C. 635.

(7) [1914] 1 K. B. 595.

"Children and Young Persons Act, 1933, s. 13: . . . . a "constable may arrest without warrant any person . . . . whom "he has reason to believe has committed an offence if he believes "such person will abscond." Note the two beliefs, one qualified, the other not.

"Criminal Law Amendment Act, 1912, s. 1: A constable may "arrest without warrant any person whom he shall have good "cause to suspect of having committed . . . . any offence . . . ."

"Dangerous Drugs Act, 1920, s. 14: Any constable may "arrest without warrant any person who . . . . is reasonably "suspected by the constable of having committed . . . . an "offence . . . . if he has reasonable ground for believing that "that person will abscond . . . . "

Note by contrast "Firearms Act, 1937, s. 6: . . . . If any "person refuses to give his name or address or is suspected "of giving a false name or address or of intending to abscond "the constable may arrest him without warrant."

"Municipal Corporations Act, 1882, s. 193: A borough "constable may while on duty arrest any idle or disorderly "person . . . . whom he has just cause to suspect of intention "to commit a felony."

"Official Secrets Act, 1911, s. 6: Any person . . . . who is "reasonably suspected of having committed . . . . an offence, "may be arrested without warrant."

"Pawnbrokers Act, 1872, s. 34: A pawnbroker may detain "any person offering in pawn any article which he reasonably "suspects to have been stolen . . . ."

"Penal Servitude Act, 1891, s. 2, sub-s. 1: Any constable "may arrest without warrant any holder of a convict's licence " . . . . whom he reasonably suspects of having committed "any offence."

"Offences against the Person Act, 1861, s. 66, and Malicious "Damage Act, 1861, s. 57: Any constable may arrest without "warrant any person whom he shall find loitering in any "highway . . . . whom he shall have good cause to suspect of "having committed or being about to commit any felony "mentioned in these two Acts."

"Road Traffic Act, 1930, s. 28: A constable may arrest "without warrant . . . . any person reasonably suspected of "taking . . . . a motor vehicle without the owner's consent . . . ."

Can any person doubt that in respect of these powers given by statute to arrest for suspicion or belief of offences or intentions to commit offences other than felonies the constable is in exactly the same position as in respect of his common law power to arrest on reasonable suspicion of felony, and that there is an "objective" issue in case of dispute to be determined by the court? No other meaning has ever been suggested. The words, moreover, do not relate merely to powers of arrest. In any context in which they are used they give rise to a similar issue of law or fact cognizable by the court. By the Criminal Law Amendment Act, 1924, s. 2: "Reasonable "cause to believe that a girl was of or above the age of sixteen "years shall not be a defence to a charge under ss. 5 or 6 of "the Criminal Law Amendment Act, 1885. Provided that in "the case of a man of twenty-three years of age or under "the presence of reasonable cause to believe that the girl "was over the age of sixteen years shall be a valid defence "on the first occasion on which he is charged with an offence "under this section." It is well settled that the onus of proving reasonable cause for belief is on the accused, and that the section means that the accused had reasonable cause to believe and did believe. It is so much an "objective" fact that in this case reasonable belief is left to the jury. The subjective test would startle any judge versed in trying crimes. Similarly by the Age of Marriage Act, 1929, s. 6, which avoids marriage where either party is under sixteen it is a defence in proceedings under the Criminal Law Amendment Act for the accused to prove that he had reasonable cause to believe that the girl was his wife. A very familiar use of the words is in actions for malicious prosecution where the plaintiff has to establish the absence of reasonable or probable cause in the prosecutor for instituting the prosecution. The relevant facts known to the prosecutor are, if necessary, determined by the jury. The judge determines whether they constitute reasonable cause. The inquiry is "objective," and the cause of action, if established with the essential element of malice, exists against any person, rich or poor, powerful or weak, including any member of the executive, whether Secretary of State or not. A further use of the words is to be found in the Directors Liability Act, 1890, s. 3, sub-s. 1 (*a*), by which it is provided that a director of a company is liable for untrue statements unless he proves that he had reasonable ground to believe that they were true.

So far, I have sought to establish that the words in question are not ambiguous, that they have only one plain and natural meaning, that with that meaning the words have been used at common law and in numerous statutes, and that whenever they are used the courts have given them the meaning I suggest, have considered that they give rise to a justiciable issue, and that as to the "subjective" meaning now contended for by the Secretary of State it has never at any time occurred to the minds of counsel or judges that the words are even capable of meaning anything so fantastic.

I will now proceed to show that in the Defence Regulations themselves the persons responsible for the framing of them—may I call them for this purpose the legislators?—have shown themselves to be fully aware of the true meaning of the words, have clearly appreciated the difference between having reasonable cause to believe and believing without any condition as to reasonable cause, and have obviously used the words "reasonable cause" in order to indicate that mere honest belief is not enough. The object is plainly that of the common law and previous statutes to secure some measure of protection for the public by providing a condition which, if necessary, can be examined by the courts. In the first place, when the decision is left to the minister or other executive authority without qualification the words omit the reference to reasonable cause. "If it appears to the Secretary of State that any "person is concerned" etc. (order as to publication, reg. 2C); "A Secretary of State . . . . if it appears to him necessary "may . . . ." (order as to giving information, reg. 6, para. (3.)); "If . . . . it appears to a Secretary of State to "be necessary . . . ." (order as to protected places, reg. 12, para. (1.)); so in regs. 14B, 16A, 18A, 21, 40B, 43B.

The wording is sometimes varied with the same result. "If "the Secretary of State is satisfied" (publication in newspaper, reg. 2D) (articles likely to assist enemy, reg. 4C); "satisfied "that it is necessary or expedient" (prohibition of balloons, reg. 7, para. (2.)); "satisfied . . . . that . . . . it is necessary" (restricting movements of persons: reg. 18A); "satisfied . . . . "that it is subject to foreign influence" (organization subject to foreign influence, 18AA). Similar words occur in regs. 35, para. (1.), 39B, 39C.

In all these cases it is plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good faith. Now let us examine the regulations which import the words "reasonable cause," some in reference to the commission of an offence, some to a defence to a charge, and some to the powers given to executive officers to do acts for the protection of the state. There are as many as twenty-three and I take them in numerical order, but it will be obvious to which class they belong. 1 (1.) (*d*): "No person shall make any "defence signal . . . . having reasonable cause to believe that "it is likely to result," etc. 1 (1.) (*e*): "No person shall do "any act . . . . having reasonable cause to believe that it "is likely to mislead," etc. 1A (*a*): "No person shall do any "act having reasonable cause to believe that it will be likely "to interfere," etc. 2C (2.): "It shall be a defence . . . . to "prove that the [alleged offender] had no intent to foment "opposition . . . . and had no reasonable cause to believe "that the matter published was calculated to foment," etc. 4: "No person shall . . . . associate with any other person "having reasonable cause to believe that that other person "is engaged in assisting the enemy." I only pause here to inquire why this belief as to association is objective, as it clearly is, and precisely similar words in reg. 18B used of the Secretary of State are subjective. 7 (3.): "If any person "authorized in writing by a Secretary of State . . . . to act "under this paragraph has reasonable ground to believe that "there is in any premises apparatus," etc., he may authorize a search. 9 (4.): "Whenever any person . . . . finds dead ". . . . a . . . . homing pigeon to which there is attached "any article which he has reasonable cause to believe to be "a means," etc. 11 (3.): ". . . . the appropriate officer ". . . . may . . . . search any article which the traveller has "with him . . . . and if the appropriate officer has reasonable "ground for suspecting that the traveller has about his person "any such article," etc., may search him. Could anything be clearer than the distinction between the unlimited power to search an article, and the limited power to search the person? This is made plainer by the express and unconditional power given by 14A (3.): Any constable may search any person entering a protected place. 18 (3.): "The Secretary of State "may make provision by order for securing that . . . . any "person entering the United Kingdom, may—(*a*) if there "is reasonable cause to believe that he has come from any "territory to which this paragraph applies, or" (*b*) if he fails to satisfy the Secretary of State or [authorized person] . . . . as to his identity . . . . be detained. Note that the detention may be by an authorized person. The distinction between the conditions in (*a*) and (*b*) is obvious. I omit for the moment reg. 18B itself, though, as I shall point out, there is a direct indication in the very words of this particular regulation that the well-established meaning is being applied.

" 18BB (1.): The Secretary of State may by order provide "for empowering any regional commissioner who has reasonable "cause to believe any person to be [as specified in reg. 18B] "to direct the detention of that person pending consideration by "the Secretary of State." By 18BB (1A.) a Secretary of State "may similarly empower any regional commissioner who has "reasonable cause to believe that the recent conduct of any "person [within a specified area] indicates . . . . that that person "is likely to assist the enemy" to direct detention of that person.

"18D. If any person upon being questioned by a constable "or a member of His Majesty's Forces . . . . fails to satisfy "him as to his identity or [purposes] the constable or member "of His Majesty's Forces may, if he has reasonable ground to "suspect that that person is about to act in any manner "prejudicial to the public safety or the defence of the realm "arrest him without warrant."

"25 (1.) Where, as respects any premises, it appears to any "officer of police of a rank not lower than that of inspector . . . . "that by reason of the fact . . . . (*d*) that there is reasonable "ground for believing that a source of danger exists on the "premises by reason of the presence thereon of unexploded "ammunition," the inspector may take steps, etc. " (2.) Any "person authorized by a Secretary of State . . . . if satisfied "that . . . . the chattel is contaminated by any lethal gas, "etc.," may take steps including destruction. Note that the limitation as to reasonable cause in respect of premises is not imposed in the case of chattels.

Now I come to a regulation which uses the words reasonable cause, and is clearly subjective.

By 42C (1.) a chief officer of police if authorized by the Secretary of State "may, if he is satisfied in the case of any "premises in his district that there is reasonable cause to believe "that " premises are unlawfully used may close them. By 42C (2.) "any person aggrieved may appeal to a court of "summary jurisdiction and the court shall, if it is satisfied "by the appellant that there is no reasonable cause to believe "the before-mentioned condition, revoke the order." By 42C (3.): "Any constable authorized . . . . by the chief "officer of police . . . . may . . . . search any premises ". . . . which the chief officer of police has reasonable grounds "for suspecting to be premises subject to the regulation." The difference between (1.) and (3.) is obvious.

"56A. Control of Building Operations. (4.) It shall be "a defence for a person . . . . to prove that . . . . he had "reasonable ground for believing that the cost . . . . would "not exceed £500."

"79. Whenever any person finds an article as to which he "has reasonable cause to believe that it has been lost or "abandoned " he shall deliver it to a member of His Majesty's Forces or a constable.

"88A (1.): If a justice of the peace is satisfied by information "on oath that there is reasonable ground for suspecting "[an offence] he may grant a search warrant. (2.) A person "authorized may search every person . . . . whom he has "reasonable ground to believe to have recently left . . . . "these premises. (3.) If an officer of police of a rank not "lower than that of superintendent . . . . has reasonable "ground for suspecting" an offence and it is impracticable to get a warrant he may confer a power of search.

"88 B. If . . . . any constable . . . . has reasonable ground "for suspecting that there is to be found in any vehicle . . . . "evidence of the commission of [an offence] he may search the "vehicle . . . . and may seize any article found therein which "he has reasonable ground for believing to be evidence . . . . "

"88 C. Any constable . . . . may arrest without warrant "any person whom he has reasonable ground for suspecting "to have committed" any of the scheduled offences which include any offence against any of the regulations.

"90 (2.): Any person who, knowing or having reasonable "cause to believe that another person is guilty of an offence," assists that person, "shall be guilty of an offence," etc.

"94 (1.): Any article coming into the possession of an "executive authority . . . . which the authority has "reasonable ground for believing to be evidence of the com-"mission of" an offence, may be retained.

I would also draw attention to the power to "use such force "as is reasonably necessary" to enter premises conferred by reg. 89, and also by reg. 23AB (*e*) and 23BA compared with the power to use such force as shall appear to the person to be reasonably necessary in 45 (3.), 45C (3.), 45D (3.) and 46 (5.).

I have pointed out that the words in question have a plain and natural meaning, that that meaning has been invariably given to them in statements of the common law and in statutes, that there has been one invariable construction of them in the courts, and that the Defence Regulations themselves clearly recognize that meaning, using different words where it is intended that the executive officer should have unqualified discretion. I have not so far called attention to the wording of reg. 18B itself which, as I venture to think, establishes within nine lines the distinction which the appellants rely on. "(1A) If the Secretary of State has "reasonable cause to believe any person to have been or to be "a member of [a certain organization] and that it is necessary "to exercise control over him, he may make" a detention order. The organizations in question are defined as "any "organization as respects which the Secretary of State is "satisfied that either—(*a*) the organization is subject to foreign "influence or control, or (*b*) the persons in control of the "organization have or have had associations with persons "concerned in the government of, or sympathies with the "system of government of, any Power with which His "Majesty is at war." The organizations, therefore, are impugned if the Secretary of State is satisfied as to their nature, but the person is not to be detained unless the Secretary of State has reasonable cause to believe that he is a member. The contrast is all the more marked when the words of 18B (I.) "If the Secretary of State has reasonable cause to believe any "person to be of hostile . . . . associations" are compared with the words of 18B (1A) which I have just quoted and which in substance say as to (*b*) if the Secretary of State is satisfied that the persons in control of the organization have hostile associations. Why the two different expressions should be used if they have the same "subjective" meaning no one was able to explain. I suggest that the obvious intention was to give a safeguard to the individual against arbitrary imprisonment. Finally, if all these considerations failed, if there were a certain ambiguity in the words "has reasonable cause to "believe" the question would be conclusively settled by the fact that the original form of the regulation issued in September, 1939, gave the Secretary of State the complete discretion now contended for: "The Secretary of State if "satisfied, etc." But it was withdrawn and published in November, 1939, in its present form. It is not competent to us to investigate what political reasons necessitated this change, but it is at least probable that it was made because objection had been taken to the arbitrary power and it was seen that Parliament might intervene. What is certain is that the legislators intentionally introduced the well known safeguard by the changed form of words.

If, then, the natural construction of the words indicates

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an objective condition to the power of the minister to detain, whose existence must, therefore, in case of dispute be cognizable by a court of law, what room is there for any other construction ? I will deal with the suggested inconvenience to the minister or possible prejudice to the interests of the State later on. I venture to quote the words of the present Lord Chancellor in *Barnard* v. *Gorman* (1), a case turning on the meaning of the word " offender " in a section of the Customs Consolidation Act, 1876. " Our duty in the matter "is plain. We must not give the statutory words a wider "meaning merely because on a narrower construction the "words might leave a loophole for frauds against the revenue. "If on the proper construction of the section that is the result "it is not for judges to attempt to cure it. That is the business "of Parliament." In that case the words were that " the "offender may be either detained or proceeded against by "summons," and the question was whether the word "offender" necessarily connoted that the person detained had in fact committed an offence, or included a person who was reasonably suspected of having committed an offence. Inasmuch as the very words referred to proceeding by summons which necessarily involved an investigation into the guilt or not of the person in question, it was considered by all the members of this House quite clear that the word was capable of both meanings and could not have been used in the same sentence in the narrower meaning for detention and the broader for summons.

The respondents sought to find support in the decision in *Rex* v. *Halliday* (2), in which this House affirmed a decision of the Court of Appeal and of a Divisional Court of which I happened to be a member. In that case the regulation undisputedly gave to a Secretary of State unrestricted power to detain a suspected person, though only on the recommendation of an advisory committee presided over by a judge. The argument for the appellant was that the regulation was ultra vires because, though the words of the Defence of the Realm Act under which that regulation was made were plainly wide enough to enable a regulation to be made giving

(1) [1941] A. C. 384.

(2) [1917] A. C. 260.

unrestricted powers, yet they ought to be read with a limitation in favour of liberty. Every judge who dealt with the case, including the noble Lords, refused to limit the natural meaning of the words, pointing out that a state of war would itself tend to confine the construction to the plain meaning of the words and would discourage any attempt to make the words lean in favour of liberty. What that case has to do with the present I cannot see. No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any minister with unlimited power over the person and property of the subject. The only question is whether in this regulation His Majesty has done so.

In the present case there is, in the first place, no ambiguity at all, and, in the second place, even if it were open to a judge to consider the question of expediency, what are the suggested grounds which compel him to adopt the hitherto unheard of "subjective" construction? It is said that it could never have been intended to substitute the decision of judges for the decision of the minister, or, as has been said, to give an appeal from the minister to the courts. But no one proposes either a substitution or an appeal. A judge's decision is not substituted for the constable's on the question of unlawful arrest, nor does he sit on appeal from the constable. He has to bear in mind that the constable's authority is limited and that he can only arrest on reasonable suspicion, and the judge has the duty to say whether the conditions of the power are fulfilled. If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief any more than, if there is reasonable evidence to go to a jury, the judge is concerned with whether he would have come to the same verdict. For instance, the minister may have reasonable grounds on the information before him for believing that a person is of "hostile origin." If so, any ruling by the courts either in an action for false imprisonment or by way of habeas corpus is impossible though it should subsequently be proved beyond doubt that the minister's information was wrong and that the person was of purely British origin. The only remedy for such a mistake is to bring objections before

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the advisory committee whose advice is not binding, and to make representations to the minister himself.

But it is said that the grounds of belief will or may be confidential matters of public importance and that it is impossible to suppose that the Secretary of State was intended to disclose either his grounds or his information to the court. My Lords, the objection is answered by the very terms of the regulation itself. By paras. 3, 4 and 5 the detained person has the right to make objections to an advisory committee, and it is the duty of the chairman " to inform the objector "of the grounds on which the order has been made against "him and to furnish him with such particulars as are in the "opinion of the chairman sufficient to enable him to present "his case." These grounds and particulars must, of course, be furnished to the chairman by the Secretary of State, for otherwise the chairman has no means of knowledge. What are these grounds and these particulars but the very facts constituting the " reasonable cause " which on the true construction might have to be investigated by the court ? I find myself unable to comprehend how it can be compulsory, as it is, to furnish the objector before the committee with the grounds and particulars, and yet impossible in the public interest to furnish the objector with them in court. The supposed difficulty is grossly exaggerated, even if it is not a fantasy. The present case of *Greene* illustrates this. On May 22, 1940, he was detained under an order which recited that the Home Secretary had reasonable cause to believe him to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him. On July 15, 1940, he was served with a document headed " Home Office, "Advisory Committee, 6 Burlington Gardens, W.1. Reasons "for order under Defence Regulation 18B in the case of "Benjamin Greene. The order under Defence Regulation "18 B was made against you for the following reasons. The "Secretary of State has reasonable cause to believe that you "have been recently concerned in acts prejudicial to the public "safety and the defence of the realm and in the preparation and "instigation of such acts and that it is necessary to exercise "control over you. Particulars." Then follow six paragraphs of particulars referring to his being concerned in the management and control of two named organizations and of the nature of speeches and writings of his, and stating that he was privy to the activities of a named person in the publication of pro-German propaganda in a named periodical, that he was subsequently to the outbreak of war communicating with persons in Germany concerned in the government of Germany, that he was desirous of establishing a national socialist regime in Great Britain with the assistance, if received, of German armed forces, that he freely associated with persons of German nationality who he had reason to believe were agents of the German government, and that there was reasonable cause to believe that he desired and intended to continue the actions aforesaid. It is true that the " reason " given was not that stated in the order, but it is explained that this was a mistake, and the " particulars " are vouched in an affidavit of the Home Secretary as particulars of the original reason of "hostile associations." It is obvious that no important reasons of State prevented the Home Secretary from disclosing the causes of his belief. It is, however, said that the sources of his information may be confidential. I think this in some cases is likely to be so, but I cannot think that this creates any difficulty. The Home Secretary has the right to withhold evidence that he can assure the court is confidential and cannot in the public interest be disclosed. He has in this case and in others sworn affidavits to the effect that the information he acted on was the result of reports and information from persons in responsible positions experienced in investigating matters of this kind and that he accepted their information. Before the era of " subjective " cause, and, indeed, afterwards, the Divisional Court and the Court of Appeal have accepted these affidavits as satisfactory proof of the existence of reasonable cause. This was not a view favoured by the Attorney-General in the present case, for it weakens his case as to public mischief. But, in fact, if the affidavits are supported by statements by or on behalf of the Secretary of State vouching the necessity of withholding the names of the witnesses in the public interest, I personally agree with the former decisions and cannot see why, if the courts believe the Home Secretary and accept the substance of the information as constituting reasonable cause, they should not be satisfied that reasonable cause has been shown. The source of the information is merely a question going to the credibility of the person informed, and, no doubt, to the issue of reasonableness. But in police matters it is often withheld, and if, for instance, a constable defending an action for false imprisonment or wrongful arrest were to give in evidence that an informant whom he believed and had proved to be trustworthy had told him that the plaintiff was present at the scene of the felony in incriminating circumstances and the constable was corroborated by his inspector and sergeant but he declined to give the name of the informant, I think it clear that the court might accept the evidence as proving reasonable cause for suspicion. I agree with the Divisional Court, in the case of Greene, in accepting what appears at that time to have been the contention of the Home Secretary that the Home Secretary's affidavit establishes the particulars as constituting reasonable cause. I think that the members of the Court of Appeal, though infected with the " subjective " virus, took the same view. In addition to this, it must be remembered that by s. 6 of the Emergency Powers (Defence) Act, 1939, there is complete power in the court to order proceedings to be heard in camera, and to prohibit the disclosure of any information concerning them. I cannot believe that proceedings for false imprisonment or for a writ of habeas corpus present more difficulties of this kind than does the trial of a spy. Lastly, on this question of expediency I would recall that for months after the regulation came into force this suggested difficulty never presented itself to the minds of the Home Secretary and his advisers, but, on the contrary, in *Rex* v. *Secretary of State for Home Affairs. Ex parte Lees* (1), the Home Secretary, when represented by the present Solicitor-General and the same junior counsel as in this case, frankly accepted the burden of proving reasonable cause.

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(1) [1941] 1 K. B. 72.

It was further said that the provision of safeguards in the regulation itself, the resort to the advisory committee, the providing of " grounds " and " particulars," and the right to make representations to the Secretary of State indicate that the original power to detain was unconditional. But how unconvincing this appears. These safeguards are nothing compared with those given to a man arrested by a constable who must at once be brought before a judicial tribunal who investigates the case in public. Yet the constable or anyone else empowered to arrest on reasonable cause is liable to an action if he has exceeded his authority.

What appears to me to be the only argument as to expediency put forward by the respondents which has any weight was that derived from the second point of the powers given—" reasonable cause to believe . . . . that by reason "thereof it is necessary to exercise control over him." Adroitly the Attorney-General dealt with this first. Can it be supposed, he said, that it was intended that the accumulated experience, instinct and knowledge of the minister in coming to a decision on this matter could be replaced by a judgment of a court of law? But first things first. Before this decision is made there has to be a valid belief that the subject was of hostile origin, associations, etc. When once this is established, it is very unlikely that a court would not in most cases accept as reasonable the Home Secretary's decision to detain. But even on this part of the machinery for detention there is ample scope for an independent inquiry. Let us take the case of " hostile "origin." If a man or a woman of hostile origin made the case that he or she had been a loyal subject for thirty or forty years, was a supporter of this country's war effort, and had never taken any part in any hostile activity, would it not be open to the courts to consider whether by reason of the hostile origin it was necessary to control him or her? Could the Home Secretary support a mere order to detain all persons of hostile origin regardless of age, sex or antecedents? Or could he support an order against a subject who had been a member of an organization which the Home Secretary was satisfied was now within 1A (*a*) or (*b*) but had ceased to be for years and had genuinely disclaimed any sympathy with its present objects. It must be remembered that at the time of the issue of the regulation organizations of both left and right were under suspicion, and there may well have been good reasons for granting protection to persons who had merely at some time or other been members of them without more.

I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time leaning towards liberty, but following the dictum of Pollock C.B. in *Bowditch* v. *Balchin* (1), cited with approval by my noble and learned friend Lord Wright in *Barnard* v. *Gorman* (2): "In "a case in which the liberty of the subject is concerned, we "cannot go beyond the natural construction of the statute." In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister. To recapitulate: The words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. They are used in the Defence Regulations in the natural meaning, and, when it is intended to express the meaning now imputed to them, different and apt words are used in the regulations

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(1) (1850) 5 Ex. 378.

(2) [1941] A. C. 378, 393.

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generally and in this regulation in particular. Even if it were relevant, which it is not, there is no absurdity or no such degree of public mischief as would lead to a non-natural construction.

I know of only one authority which might justify the suggested method of construction: "'When I use a word,' "Humpty Dumpty said in rather a scornful tone, 'it "'means just what I choose it to mean, neither more nor "'less.' 'The question is,' said Alice, 'whether you can "'make words mean so many different things.' 'The question "'is,' said Humpty Dumpty, 'which is to be master—that's "'all.'" ("Through the Looking Glass," c. vi.) After all this long discussion the question is whether the words "If a "man has" can mean "If a man thinks he has." I am of opinion that they cannot, and that the case should be decided accordingly.

If it be true, as, for the foregoing reasons, I am profoundly convinced it is, that the Home Secretary has not been given an unconditional authority to detain, the true decision in the two cases before us ought not to be difficult to make. In the *Liversidge* case the appellant has delivered a statement of claim averring that he was wrongly imprisoned by the respondent, the Secretary of State. The respondent traverses the wrongful imprisonment and contents himself with the admission that he ordered the appellant to be detained under the regulation. The appellant asked for particulars of his reasonable cause to believe (*a*) as to hostile associations, (*b*) as to necessity to control him. In my opinion, the appellant is not bound to rely on the traverse, though as a matter of pleading that, in my opinion, amounts to a positive allegation of authority to detain for which particulars may be asked. The appellant's right to particulars, however, is based on a much broader ground, a principle which again is one of the pillars of liberty in that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot in such proceedings as the present be questioned. My noble friend, Lord Macmillan, suggests that under a more exacting system of pleading the appellant would have to aver the absence of reasonable grounds on the part of the Secretary of State. The English system of pleading was exacting enough a hundred years ago, but then and ever since, by reason of the presumption I have stated, the averment in an action against a constable for false imprisonment was in the form adopted in the present case, and the defendant had to plead his justification with particulars: *Holroyd* v. *Doncaster* (1), and the cases cited earlier in this judgment. There is no distinction of persons. The defendant has to justify with particulars, and in my opinion the appellant in this case was clearly right in asking for particulars. If the respondents were able to satisfy the court that they could not give particulars in the public interest, the court would either not order particulars or, if the objection came after the order, would not enforce it. There was no evidence of this kind at the hearing of this summons, and, in my opinion, the appeal ought to be allowed and an order made in the terms of the summons.

In the *Greene* case the circumstances are not the same. It may be that in an application for a writ of habeas corpus the applicant could rely on the presumption against imprisonment and seek to throw the onus without more on the defendant, but in practice he does not do so. He puts material before the court to lead to the conclusion that the imprisonment was unlawful, and that is what the applicant did here. The Secretary of State appears to have been ready to meet the allegation of absence of reasonable cause. He referred to his order, to the particulars given by the advisory committee, which he insists were correct, and he made the affidavit already referred to that he acted on the information of trustworthy informants. His affidavit does not claim privilege in the correct form, but he instructed the Attorney-General on his behalf to claim privilege which in this case, in the absence of any objection to this course by the applicant, must be taken

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(1) 3 Bing. 492.

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to be sufficient. The Divisional Court were of opinion that, in view of this evidence, the applicant failed to satisfy them that there was an absence of reasonable cause. I have given my reasons for agreeing with them, and I would go further and say that, in view of the particulars, as to which I take it to be proved that the Secretary of State had information which he could reasonably believe, the Secretary of State has established reasonable cause for believing both the hostile associations and the necessity to control.

Of course, if the subjective theory is right and the Secretary of State has indeed unconditional power of imprisonment, it was enough for him to say that he exercised the power. But it seemed to be suggested in argument that, even if the power were conditional, yet it would be a good return by the Secretary of State to say that he had made the order in the terms of the regulation. This seems to me, with respect, to be fantastic. A minister given only a limited authority cannot make for himself a valid return by merely saying I acted as though I had authority. His ipse dixit avails nothing. A constable would make no valid return by saying: "I had reasonable cause for my arrest," or "I served the "criminal at the time with a written notice that I was arresting "him for reasonable suspicion of felony." However, on my view of this, the Secretary of State has made a return sufficient to indicate that the Divisional Court were right in refusing to order the writ to issue. I think that the appeal in this case should be dismissed.

Lord Macmillan. My Lords, by common assent at your Lordships' Bar it was agreed that the substantial question in these proceedings relates to the true meaning and effect of certain words contained in reg. 18B, para. 1, of the Defence (General) Regulations, 1939. By that regulation the Secretary of State is empowered to make an order for the detention of any person if he "has reasonable cause to believe" such person "to be of hostile origin or associations or to have "been recently concerned in acts prejudicial to the public "safety or the defence of the realm or in the preparation

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"or instigation of such acts and that by reason thereof it "is necessary to exercise control over him." Before he exercises the power confided to him of making a detention order against any individual the Secretary of State must have reasonable cause to believe certain things about that individual. Does this mean that the Secretary of State must have such cause of belief regarding the relevant facts as a court of law would hold sufficient to induce belief in the mind of any ordinary reasonable man? Or does it mean that he must have such cause of belief as he himself deems to be reasonable? To require that a cause of belief shall be reasonable necessarily implies a reference to some standard of reasonableness. Is the standard of reasonableness which must be satisfied an impersonal standard independent of the Secretary of State's own mind, or is it the personal standard of what the Secretary of State himself deems reasonable? Between these two readings there is a fundamental difference in legal effect. In the former case the reasonableness of the cause which the Secretary of State had for his belief may, if challenged, be examined by a court of law in order to determine whether he had such cause of belief as would satisfy the ordinary reasonable man, and to enable the court to adjudicate on this question there must be disclosed to it the facts and circumstances which the Secretary of State had before him in arriving at his belief. In the latter case it is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called on to disclose to anyone the facts and circumstances which have induced his belief or to satisfy anyone but himself that these facts and circumstances constituted a reasonable cause of belief.

Before discussing which of these rival views ought to prevail, I must first indicate briefly the form in which the question has come before your Lordships. On May 26, 1940, the respondent, Sir John Anderson, then Secretary of State for Home Affairs, made and signed an order in the following terms:

"DEFENCE (GENERAL) REGULATIONS, 1939.
"DETENTION ORDER.

"Whereas I have reasonable cause to believe Jack Perlzweig "alias Robert Liversidge to be a person of hostile associations "and that by reason thereof it is necessary to exercise control "over him: Now, therefore, I, in pursuance of the power "conferred on me by reg. 18B of the Defence (General) "Regulations, 1939, hereby make the following order: I "direct that the above-mentioned Jack Perlzweig alias Robert "Liversidge be detained.

"(Signed) John Anderson,
"One of His Majesty's Principal
"Secretaries of State."

In virtue of this order the appellant was taken to Brixton Prison where he has since been detained. On March 14, 1941, the appellant issued a writ against the respondent, Sir John Anderson, and also against Mr. Herbert Stanley Morrison, who now in succession holds the office of Secretary of State for Home Affairs. In his statement of claim the appellant made (inter alia) the following allegations: "(3.) By a "document dated May 26, 1940, and expressed to be a "detention order under reg. 18B of the Defence (General) "Regulations, 1939, the first-named defendant ordered and "directed that the plaintiff be detained. (4.) In consequence "and by reason of the said order and direction the plaintiff "was on or about May 29, 1940, arrested and he has since "been and still is detained and imprisoned at H.M. Prison "at Brixton. . . . . (6.) In the premises the defendants have "and each of them has caused and procured the unlawful "detention and imprisonment of the plaintiff and the second-"named defendant continues and intends to continue the "same." The statement concludes by claiming a declaration that the appellant's detention and imprisonment was and is unlawful, damages for false imprisonment, and, against Mr. Morrison, an injunction against the continued detention and imprisonment of the appellant. The respondents lodged a defence admitting that Sir John Anderson ordered that the appellant should be detained under reg. 18B of the

Defence (General) Regulations, 1939, but otherwise making no admission. The appellant subsequently applied to the master for an order on the respondents to give particulars "(*a*) of the grounds upon which the first-named defendant "had reasonable cause to believe the plaintiff to be a person "of hostile associations; and (*b*) of the grounds upon which "the first-named defendant had reasonable cause to believe "that by reason of such hostile associations it was necessary "to exercise control over the plaintiff." This application was refused by the master and on appeal successively by Tucker J. and the Court of Appeal.

I cannot refrain from remarking on the economy of the appellant's averments. The action is one of damages for false imprisonment, but the appellant nowhere states categorically that he has been wrongly imprisoned or in what respect the order in consequence and by reason of which he says he has been detained is illegal, irregular or defective. In particular, he does not allege what appears to be his real complaint, that the Secretary of State had no reasonable ground to believe that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. Under the more exacting rules of pleading to which I was accustomed in the courts of Scotland the relevancy and sufficiency of the averments which I have above set out would certainly not have escaped criticism. Be that as it may, it is at least abundantly clear that the action is of an exploratory nature. The appellant claims that he is entitled to explore the mind of the Secretary of State in order to find out what was the state of his information, in the hope that when this is revealed it may prove to be such that the court will hold it not to afford a reasonable cause for the belief which the Secretary of State professed to entertain, when judged by the standard of the ordinary reasonable man.

I am thus brought back to the point from which I started, for the answer to the question whether the appellant is entitled to explore the mind of the Secretary of State depends entirely on the true interpretation of the language in which his powers are conferred on him. For the appellant it was maintained that the words of the regulation were clear and unambiguous. The competency of the Secretary of State to make a detention order was, it was argued, plainly subject to a condition precedent. There must exist in fact reasonable cause for belief in certain things, quite independently of what the Secretary of State himself chose to believe. It was further said that "reasonable cause" was a term of art, frequent and familiar in similar contexts, and always carried with it a reference to an external or impersonal standard.

I do not agree that the critical phrase in the context in which I find it is susceptible only of one meaning, namely that for which the appellant contends. Were it so it would be strange that several learned judges should have found it to possess quite a different meaning. Had the phrase run in impersonal form—"If there is reasonable cause to believe"—there would have been more justification for maintaining that there was no ambiguity, though I should not even so have regarded the matter as beyond question. But the regulation does not so run. It reads: "If the Secretary of State has reasonable "cause to believe . . . ." and thus at once introduces a personal, not an impersonal, requirement.

Holding then, as I do, that the opening words of the regulation are open to interpretation, I now propose to seek what aid I can from the permissible sources of guidance. In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time.

It is, therefore, proper to consider with what object the regulation was made. This appears clearly from the terms of the empowering statute, the Emergency Powers (Defence) Act, 1939. By s. 1, sub-s. 1, of that Act " His Majesty may "by order in council make such regulations . . . . as appear "to him to be necessary or expedient for securing the public "safety, the defence of the realm, the maintenance of public "order and the efficient prosecution of any war in which "His Majesty may be engaged, and for maintaining supplies "and services essential to the life of the community." The second sub-section in particular authorizes the making of Defence Regulations (inter alia) "for the detention of persons "whose detention appears to the Secretary of State to be "expedient in the interests of the public safety or the defence "of the realm." There could be no clearer evidence of the intention of Parliament to authorize the abrogation in the public interest and at the absolute discretion of the Secretary of State of the ordinary law affecting the liberty of the subject. A perusal of the whole Act and of the subsequent Act of 1940 is sufficient to satisfy any reader of the extraordinary interferences with the citizen's most cherished rights of person and property which, in the view of Parliament, may be necessary and proper in the present grave national danger. In considering the interpretation of the regulation authorizing the Secretary of State to make detention orders I therefore bear in mind that Parliament has expressly contemplated that he should by regulation be empowered to do so at his absolute discretion. I also note as indicative of the abnormal and temporary character of the legislation that it is expressly limited in duration. With its expiry the power of detention will, of course, also come to an end.

In the next place, it is relevant to consider to whom the emergency power of detention is confided. The statute has authorized it to be conferred on a Secretary of State, one of the high officers of State who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office and who has access to exclusive sources of information. In a question of interpreting the scope of a power it is obvious that a wide discretionary power may more readily be inferred to have been confided to one who has high authority and grave responsibility.

I turn now to the nature of the topics as to which the Secretary of State is under the regulation to have reasonable cause of belief. They fall into two categories. The Secretary of State has to decide (1.) whether the person proposed to be detained is a person of hostile origin or associations or has been recently concerned in certain activities, but he has also to make up his mind (2.) whether by reason thereof it is necessary to exercise control over him. The first of these requirements relates to matters of fact, and it may be that a court of law, if it could have before it all the Secretary of State's information—an important "if"—might be able to say whether such information would to an ordinary reasonable man constitute a reasonable cause of belief. But how could a court of law deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, not of fact? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share. As Lord Parker said in *The Zamora* (1): "Those who "are responsible for the national security must be the sole "judges of what the national security requires. It would be "obviously undesirable that such matters should be made "the subject of evidence in a court of law or otherwise "discussed in public." I may also quote the words of Lord Finlay L.C. in *Rex* v. *Halliday* (2): "It seems obvious that no "tribunal for investigating the question whether circumstances

(1) [1916] 2 A. C. 77, 107.

(2) [1917] A. C. 260, 269.

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"of suspicion exist warranting some restraint can be imagined "less appropriate than a court of law." The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence.

As I have indicated, a court of law manifestly could not pronounce on the reasonableness of the Secretary of State's cause of belief unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge both of facts and of policy which he had. But the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him. What is to happen then? The appellant says that the court is entitled and has a duty to examine the grounds of the Secretary of State's belief. But the court is also bound to accept a statement by the Secretary of State that he cannot consistently with the public interest divulge these grounds. Here is indeed an impasse. The appellant's solution has the merit of courage, not to say audacity. He says that where the Secretary of State, by declining to disclose his information, has failed, through no fault of his own, to justify the detention, he must be held confessed of having falsely imprisoned the detained person and must be mulcted in damages. It will naturally be in the most dangerous cases, where detention is most essential to the public safety, that the information before the Secretary of State is most likely to be of a confidential character, precluding its disclosure. Yet the court is to be constrained where detention is most justifiable to find the detention unjustified. I decline to accept an interpretation of the regulation which leads to so fantastic a result.

Were the person detained left without any safeguard, this might be an argument against holding that an absolute discretion has been conferred on the Secretary of State, but the argument is the other way when it is found, as it is in this regulation, that elaborate provision is made for the safeguarding of the detained person's interests. I refer to the constitution of advisory committees to which any person aggrieved by a detention order may make representations.

The duty is imposed on the chairman to inform the objector of the grounds on which the detention order has been made and to furnish him with such particulars as are in the chairman's opinion sufficient to enable him to state his case. I say nothing as to the efficacy of this safeguard, for I do not know how it operates in practice, but I emphasize the significance of its presence in the regulation. It suggests that this special procedure was introduced for the very reason that review by the law courts was excluded. Yet here again the paramount concern not to diminish the personal authority and responsibility of the Secretary of State is evidenced by the recognition of his right to decline to follow any advice given to him by an advisory committee. Nevertheless, says the appellant, he must accept the decision of a court of law, however contrary to his own view. I note a further safeguard in the requirement that the Secretary of State must at least every month report to Parliament as to the action taken by him under the regulation (including the number of persons detained under orders made thereunder) and as to the number of cases, if any, in which he has declined to follow the advice of an advisory committee. The regulation concludes with the following provision: "(8.) Any person detained in pursuance "of this regulation shall be deemed to be in lawful custody "and shall be detained in such place as may be authorized by "the Secretary of State and in accordance with instructions "issued by him." I see the force of the point taken by the appellant that this gives protection to the Secretary of State only where a person has been detained "in pursuance of" the regulation and would not protect him where the detention was not warranted by the regulation, but the provision at least exhibits anxiety to afford the Secretary of State the fullest measure of protection when acting within his powers.

I must not omit to notice the appellant's argument founded on the contrast between the opening words of the regulation in conferring the power of detention on the Secretary of State and the words used elsewhere in the regulations when other powers of an admittedly discretionary character are conferred on him and on others. The argument is that where different

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words are used a different meaning is intended. The argument by contrast is of little assistance in the present instance, for the regulations have observed no uniformity of language. Lord Blackburn, then Blackburn J., once said that you ought "never to change the form of words unless you are going to "change the meaning and it would be as well if those who are "engaged in the preparation of Acts of Parliament would "bear in mind that that is the real principle of construction. "But," he went on to say, "in drawing Acts of Parliament "the legislature, as it would seem, to improve the graces of "the style and to avoid using the same words over and over "again constantly changes them": *Hadley* v. *Perks* (1). The regulations before your Lordships certainly exhibit a remarkable diversity of terminology. Thus I find the following expressions used with relation to various powers confided to various persons: "If it appears to the Secretary of State"; "If the Secretary of State is satisfied"; "If he considers it "necessary"; "Where it is shown to the satisfaction of"; "Where it appears to the proper authority that there is "reason to believe." More intensive study of the regulations would probably disclose further variations in language where there is no substantial difference in meaning and effect. The argument that when the regulations mean different things they use different language and when they mean the same thing they use the same language breaks down, regrettable as this must be to the drafting purist.

But then it is said that the critical words have been introduced by an amendment of the language used in the regulation as originally made, and must be taken to have been altered advisedly. I do not know, and it would not be proper for me to inquire why a change was made, but it may well be that in view of the gravity of this matter of detention it was thought right to adopt more emphatic words by way of admonition to the Secretary of State to make sure of his grounds before he took action. If the regulation had been framed so as to read, as the appellant would read it, "If "the Secretary of State has such cause of belief as a court

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(1) (1866) L. R. 1 Q. B. 444, 457.

"of law would hold to be reasonable," I doubt if it would have commended itself as an emergency measure. Courts may differ as to what is reasonable. A judge of first instance might hold the Secretary of State to have been justified in his belief, the Court of Appeal might take another view and this House might have its own view. In a matter at once so vital and so urgent in the interests of national safety, I am unable to accept a reading of the regulation which would prescribe that the Secretary of State may not act in accordance with what commends itself to him as a reasonable cause of belief without incurring the risk that a court of law would disagree with him, and also without the further liability that, should the court do so or if he cannot consistently with his duty disclose to the court the grounds of his belief, he will be mulcted in damages for false imprisonment as having acted outwith his powers.

My Lords, I make no apology for having discussed so fully the various aspects of the question before the House, for it is one of the highest importance. I yield to no one in my recognition of the value of the jealous scrutiny which our courts have always rightly exercised in considering any invasion of the liberty of the subject. But I remind myself, in Lord Atkinson's words, that " however precious the personal liberty "of the subject may be there is something for which it may "well be, to some extent, sacrificed by legal enactment, "namely, national success in the war or escape from national "plunder or enslavement" : *Rex* v. *Halliday* (1). The liberty which we so justly extol is itself the gift of the law and as Magna Carta recognizes may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention. In the Court of Appeal the question was approached from the point of view of onus, as was not unnatural in view of

(1) [1917] A. C. 260, 271.

the form in which the matter came before the court. I have preferred to deal with the substance, but in view of what was said in the Court of Appeal I should add that, in my opinion, the production by the Secretary of State of an order of detention by him ex facie regular and duly authenticated, such as the House has before it in this case, constitutes a peremptory defence to any action of false imprisonment and places on the plaintiff the burden of establishing that the order is unwarranted, defective or otherwise invalid. Counsel for the appellant admitted that if the House should adopt the interpretation of the regulation which I have reached the appeal must be dismissed and I concur in the motion that that be its fate.

LORD WRIGHT. My Lords, this appeal and the appeal which immediately followed it, *Greene* v. *Secretary of State for Home Affairs* (1), have the common feature that each involves an inquiry into the true construction of reg. 18B, one of the Defence Regulations made under the Emergency Powers (Defence) Act, 1939. The argument on construction has primarily turned upon para. 1 of the regulation which is in these terms: "If the Secretary of State has reasonable cause "to believe any person to be of hostile origin or associations "or to have been recently concerned in acts prejudicial to "the public safety or the defence of the realm or in the "preparation or instigation of such acts and that by reason "thereof it is necessary to exercise control over him, he may "make an order against that person directing that he be "detained." The remainder of the regulation will require to be considered in so far as it throws light on the effect of the words just quoted. In the present appeal the appellant has been and is being detained in pursuance or professed pursuance of the regulation under an order made by the first respondent in which he stated that he had reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The appellant brought an action for unlawful imprisonment against the first respondent who originally made

(1) Post, p. 284.

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the order during his period of office as Home Secretary and against his successor the second respondent who confirmed and continued it. In form the proceedings under appeal simply involve an application for particulars by the appellant of the grounds upon which the first respondent had reasonable cause to believe the appellant to be a person of hostile associations and to believe that by reason thereof it was necessary to exercise control over him. The application has been refused by the master, by Tucker J., and by the Court of Appeal. The respondents have relied on the order (which was admitted in the statement of claim) as showing on its face the lawful exercise of the powers and duties vested in, or imposed on, them under the regulation, and without more showing a sufficient justification. The appellant has contended that the detention order was not sufficient justification on its face because the validity of such an order depends on proof by the respondents of what according to the arguments of the appellant was a " condition precedent to its validity," namely, that the Home Secretary had reasonable cause to believe the two matters set out in the order and hence that the respondents could not rely on the order as a lawful order unless they could establish by the judgment of the court that they had reasonable grounds for their belief. As this, it was said, was what the respondents had to prove in the action, they were bound to give particulars of their case. The respondents, on the contrary, contended that they were invested with a duty and discretion in their office as ministers such that, if it was exercised in good faith (which was not in question), the interference with the appellant's liberty was lawful and was not subject to the jurisdiction of the court. The discretion of the Home Secretary was, it was said, made final by the words of the statutory regulation. The terms of the regulation made the decision of a court as to the reasonableness in fact of the Home Secretary's belief immaterial. The only relevant question was whether the Secretary had a belief which to his mind was reasonable. In the words which Lord Finlay L.C. in *Rex* v. *Halliday* (1) used in reference to the similar provision in the corresponding Defence of the Realm Regulations made during the last war, "no tribunal for investigating the question "whether circumstances of suspicion exist warranting some "restraint can be imagined less appropriate than a court of "law." These conflicting contentions raised a question of principle. Counsel on both sides have argued on the substance of the matter, putting aside technical questions of practice and pleading.

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(1) [1917] A. C. 260, 269.

What is involved is the liberty of the subject. Your Lordships have had your attention called to the evils of the exercise of arbitrary powers of arrest by the executive and the necessity of subjecting all such powers to judicial control. Your Lordships have been reminded of the great constitutional conflicts in the seventeenth century, which culminated in the famous constitutional charters, the Petition of Right, the Bill of Rights, and the Act of Settlement. These struggles did, indeed, involve the liberty of the subject and its vindication against arbitrary and unlawful power. They sprang (to state it very broadly) from the Stuart theory that the King was King by divine right and that his powers were above the law. Thus a warrant of arrest "per speciale "mandatum Domini Regis" was claimed to be a sufficient justification for detention without trial. But by the end of the seventeenth century the old common law rule of the supremacy of law was restored and substituted for any theory of royal supremacy. All the courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulation, like reg. 18B, which has admittedly the force of a statute, because there is no suggestion that it is ultra vires or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a

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subject, the only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in the light of the circumstances and the general policy and object of the measure. I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannous conduct. But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency.

I confess that, notwithstanding all my prejudices in favour of upholding the liberty of the subject, I have come to a clear conclusion that the courts below were right in refusing the particulars asked for. No reasons were given by the master or Tucker J., but in a later case, *Stuart* v. *Anderson and Morrison* (1), Tucker J. adopted in an action for unlawful imprisonment substantially what I regard as the true construction of reg. 18B. He said in effect that it was clear from the regulation that the decision on this difficult matter was not to be entrusted to one of His Majesty's judges, or to any ad hoc tribunal, but to the Home Secretary alone, and that the court has no jurisdiction to sit as an appellate tribunal on any decision of the Home Secretary, much less has the court power to try any case itself, in order to see if it would have come to the same conclusion as the Home Secretary if the legislature had entrusted the matter to a judge. The judge adds what is obvious, that the court might no doubt be called on to decide questions of bona fides or mistaken identity, if they should ever arise. I may further here refer to the judgment of the Court of Appeal in *Greene's* case (2), the appeal in which follows this appeal. I shall in due course examine that case which raises technical questions on the law

(1) (1941) 165 L. T. 120. (2) [1942] 1 K. B. 87.

or practice applying to proceedings in habeas corpus, but the construction of the regulation is the substantial foundation of that case as well as this. I ought therefore to advert here briefly to what was said on that issue. Scott L.J., who gave the leading judgment, was of opinion that the decision of the Home Secretary was executive, not judicial, and that the regulation made him the final judge of the reasonableness of the causes on which he took action. " The whole regulation," said the Lord Justice (1), "deals with a topic which is necessarily "of a highly confidential character. It invites a decision, "at least as a preliminary to action, by an executive Minister "of the Crown, who occupies a position of utmost confidence; "who has at his disposal much secret information which "ought not to be made public—above all during a war—who "is under a duty to keep that information and its sources "secret; and, finally, who cannot be compelled in any court "to divulge what he considers ought not in the national "interest to be divulged." MacKinnon L.J., who agreed with his brethren, said (2) that power of the Home Secretary to issue a valid order depended on the fulfilment of a condition, the existence of a state of mind in the Home Secretary, that is, that he had reasonable grounds for believing certain facts to exist, and by implication that he honestly entertained that belief. Goddard L.J., I think, also treated the material issue as being what is the Home Secretary's state of mind.

I find support for this view in *Rex* v. *Halliday* (3), a habeas corpus case arising during the last war on a regulation very similar in its general character to reg. 18B. There were differences in the language of the reg. 14B which was the enactment there in question, and the machinery was in some respects different. I am here only concerned with the general principles stated by this House. Their Lordships brushed aside an argument not raised in the present case that the regulation was ultra vires of the statute. Lord Shaw dissented on that point. He did not proceed on any doubt as to the meaning of the regulation, which he held, if valid, vested

(1) [1941] 1 K. B. 87, 98.
(2) Ibid. 108.
(3) [1917] A. C. 260.

according to its terms in the Secretary of State plenary discretion to arrest and detain a subject without trial. On that ground he was of opinion that it was outside the delegated legislative power conferred by the Act because there were no express words in the Act providing for imprisonment without trial. The majority of their Lordships held that the regulation was not ultra vires. Lord Finlay L.C. (1) said that the measure was "not punitive but precautionary." It was directed to taking precautions during the war against the dangers of espionage and sabotage which experience showed to be so serious. "No crime," he said, "is charged. The question "is whether there is ground for suspicion that a particular "person may be disposed to help the enemy. The duty of "deciding this question is by the order thrown upon the "Secretary of State, and an advisory committee presided "over by a judge of the High Court [which was the machinery "under reg. 14B] is provided to bring before him any grounds "for thinking that the order may properly be revoked or "varied." He added that the suggested rule as to construing penal statutes in favour of the liberty of the subject had no reference to a case dealing with an executive measure by way of preventing a public danger. These wise words were concurred in by Lord Dunedin, who added (2) that preventive measures in the shape of internment of persons likely to assist the enemy might obviously be necessary, and Parliament had risked the chance of abuse which is always theoretically present when absolute powers in general terms are delegated to an executive body, thinking that the restriction of the powers to the duration of the war was a sufficient safeguard. "However precious," said Lord Atkinson (3), "the personal "liberty of the subject may be, there is something for which "it may well be, to some extent, sacrificed by legal enactment, "namely, national success in the war or escape from national "plunder or enslavement. It must not be assumed," he said, "that the powers conferred upon the executive by statute "will be abused."

These speeches embody statements of principle very relevant to the present case, and, notwithstanding differences in the particular enactments, furnish an important and direct precedent for the conferring of powers to exercise preventive detention on his own responsibility on the Home Secretary, and, subject to theoretical exceptions not relevant here, ousting the jurisdiction of the court. In ordinary administrative measures, the legislative practice of substituting for the jurisdiction of the court that of a specially constituted tribunal is well established and increasingly frequent, particularly since the decision of this House in *Local Government Board* v. *Arlidge* (1). The case dealt with closing orders under the Housing and Town Planning Act, 1909. Lord Haldane L.C. (2) pointed out that in regard to these administrative orders "the jurisdiction, both as regards original "applications and as regards appeals, was in England transferred "from courts of justice to the local authority and the Local "Government Board, both of them administrative bodies." It is true that the personal liberty of the subject was there not affected, but only his liberty to do what he likes with his own. But the principle is the same. Parliament excludes the jurisdiction of the courts and substitutes in the one case a specially constituted administrative body, in a case like the present the Secretary of State. In no case are ordinary legal rights to be affected unless and then only to the extent that Parliament has enacted to the contrary. In reg. 18B the Home Secretary is expressly empowered to make a detention order in the circumstances specified. What are these circumstances? They are a belief or mental state of the minister. Except for the word "reasonable," which I shall later discuss, there is no reference to anything but his personal belief, because I think that actual belief is implied by the words "has reasonable cause "to believe." His belief is something personal to himself. The reasonable cause can only be material in so far as it is an element present to his mind which determines his own belief. The "cause to believe" is part of the content of his mind. The matters specified, except hostile origin and, perhaps, hostile associations, are matters of opinion or

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(1) [1917] A. C. 260, 269. (2) Ibid. 271. (3) Ibid. 271.

(1) [1915] A. C. 120. (2) Ibid. 132.

judgment, not matters of fact. It is essentially a matter of expert and instructed conclusion or suspicion whether or not the acts in which the subject has been concerned were such as to be prejudicial to the public safety or defence of the realm; even more obviously is the belief or decision that by reason thereof it is necessary to exercise control over him a matter of executive discretion. It is clear that the control is preventive, not punitive, and that the action is not judicial, but executive.

The regulation places on the Secretary a public duty and trust of the gravest national importance. As I understand the regulation, it is a duty which he must discharge on his own responsibility to the utmost of his ability, weighing, on the one hand, the suspect's right to personal liberty, and, on the other hand, the safety of the State in the dire national peril in which during this war it has stood and stands. All the circumstances of national safety to which this House adverted in *Rex* v. *Halliday* (1) are present in this war, only with vastly increased urgency and gravity, because German methods for effecting the poisonous infiltration among British or allied subjects of their purposes and schemes have been immensely more subtle and ingenious than in the last war. Even a judge may be allowed to take notice of the import of words like Fifth Columnists and Quislings and the like. It is the duty of the Secretary to check these underground and insidious activities of the enemy and their consequences, whether they result in sabotage or in anti-British propaganda or in weakening the national effort and endurance. In reg. 14B, during the last war, the minister could only act on the recommendation of a competent naval or military authority or of the advisory committee. There was, it seems, an external condition in that respect. In reg. 18B that pre-condition is absent. The Secretary must now act on his own responsibility if he has reasonable cause to believe, that is, believes that he has in his own mind what he thinks is reasonable cause. If that is his mental state, the duty to act in the national interest attaches. That is a higher duty than the duty to regard the liberty of the subject. I cannot see any ground for holding

(1) [1917] A. C. 260.

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that the performance of that duty is to be subject to the decision of a judge, who cannot possibly have the full information on which the minister has acted or appreciate the full importance in the national interest of what the information discloses. In these cases full legal evidence or proof is impossible, even if the Secretary does not claim that disclosure is against the public interest, a claim which must necessarily be made in practically every case, and a claim which a judge necessarily has to admit. To a large extent the sources of information must be secret. Espionage must be met by counter-espionage. Even to refuse the disclosure may give dangerous hints to the enemy. A hearing in camera is, no doubt, permissible (in particular under s. 6 of the Emergency Powers (Defence) Act, 1939), but a hearing in camera, if the public called for full disclosure, would not satisfy the public conscience, and in matters of this delicacy leakage must inevitably take place. Counsel on both sides refused to accept the suggestion that at a trial where the issue was whether the Secretary was justified in making his order, the judge might say at some early stage that he was satisfied by what he had heard and stop the case, treating the onus as being on the defendant and hold that it was discharged. That, it seems to me, would be the travesty of a trial. I can imagine the counsel for the plaintiff insisting that the case should be fully tried, that he was entitled to cross-examine the Secretary on a matter personal to himself, that part evidence might be edited and selected, that the judge could not decide the case unless he had all the evidence, and that the defendant (on whom the appellants allege rests the burden of justifying the detention) must fail in his defence if he refuses to disclose material evidence, even on the ground that to disclose it is against the national interest. In any case, neither the appellant nor the respondent was satisfied with the half-way house. However, on the construction of the regulation which I accept, the question does not arise. These and other like considerations make Lord Finlay's observation which I quoted above, that no tribunal could be imagined less appropriate than a court of law for deciding these questions, at least as applicable to reg. 18B as it was to reg. 14B under the earlier statute. I might go further and say that the court is not merely an inappropriate tribunal, but one the jurisdiction of which is unworkable and even illusory in these cases. In my judgment, a court of law could not have before it the information on which the Secretary acts, still less the background of statecraft and national policy which is what must determine the action which he takes on it.

I am confirmed in the opinion that the matter is one for executive discretion by other provisions in the regulation, in particular, those relating to the advisory committee or committees which are to be appointed under para. 3 of the regulation by the Secretary of State, which are to hear objections to or in respect of any order made under the regulation. Under para. 4 the Secretary is to give the person against whom the order is made the earliest possible opportunity of making representations to him in respect of the order and inform him of his right to make objections before the committee. The chairman of the committee is to inform the objector of the grounds (which I think means grounds of a general nature, such as hostile origin or associations) and also give him such particulars as in the opinion of the chairman are sufficient to enable him to present his case. It is said on behalf of the appellant that such provisions are no substitute for a trial before an independent judge and that the committees are chosen by the Secretary and that the Secretary may decline to attend to their advice. This is true enough, but they go to show that the regulation is dealing with an executive discretion, in the exercise of which the discretion of the minister is final. They seem to me to be inconsistent with the idea that recourse to a court of law by way of appeal against or justification of the order was open. Indeed, if that had been contemplated I think that there must have been express words giving it. These provisions seem to me to be a substitute for a trial in court of the issues, no doubt inadequate in one sense, but as effective as the circumstances admit. I particularly rely in support of my conclusion on the circumstance that the Secretary is entitled to decline to follow the recommendation or advice of the committee. The responsibility is his alone.

But against all these arguments the appellant relies on the use of the word "reasonable" as qualifying the "cause to "believe." It is said that "reasonable" necessarily implies an external standard to be applied by someone other than the Secretary, namely, by a judge. I cannot accept that contention, which seems to me to subordinate the whole substance of the enactment to a single word which itself is ambiguous and inconclusive. The word "reasonable" does indeed imply instructed and intelligent care and deliberation, the choice of the course which reason dictates. But the choice is not necessarily that of an outsider. If I am right in my view of the effect of the regulation, the choice can only be the choice of the minister. All the word "reasonable," then, means is that the minister must not lightly or arbitrarily invade the liberty of the subject. He must be reasonably satisfied before he acts, but it is still his decision and not the decision of anyone else. If in ordinary affairs I say that I reasonably believe in the truth of certain facts or in the propriety of certain conduct, I am prima facie adopting as my reason my own judgment. If I mean to refer to some external yardstick I should in general naturally say so expressly unless the contrary was clear from other circumstances. "Reasonable" connotes a quality or characteristic. Who is to decide on reasonableness is a different matter which depends on the circumstances. This disposes to my mind of the argument strenuously urged on the basis of a number of decisions in which it has been held that "reasonable" necessarily in every case imports what is reasonable in the judgment of a judge or a jury. That may be so when the particular conduct is properly subject to review in a court of law. When it comes before a court of law the party impugned cannot be judge in his own cause. Thus, the shopwalker who takes the protesting woman customer into the manager's office as a suspected thief cannot, when he or the store is sued for false imprisonment, simply say as a sufficient answer that he thought he had reasonable cause. On that issue the judge must decide. This is equally true in a case of malicious prosecution: *Herniman* v. *Smith* (1). And when a lascivious youth under twenty-three years old is charged with having carnal knowledge of a girl under sixteen, it is not for him but for the jury to decide if he had reasonable grounds for his belief that she was not under sixteen: *Rex* v. *Banks* (2), *Rex* v. *Forde* (3). Again, it is for the court to decide if a director sued under the Directors Liability Act (or the corresponding section of the present Companies Act) for untrue statements in a prospectus can establish his defence which he cannot do by simply showing that he thought he had reasonable grounds for believing them to be true: *Alman* v. *Oppert* (4). That is the very question in dispute which the court is required to decide. Similarly the blackmailer is not the person to judge that he had reasonable cause for the demand: *Thorne* v. *Motor Trade Association* (5). Another class of illustrations of the same principle is found in the numerous statutes giving to constables a power of arresting without warrant, by words like "reasonably suspects," or "has reasonable," or "good," "cause to suspect." A collection of these is to be found in the second (Hailsham) edition of Halsbury's Laws of England, vol. ix., pages 72 to 94. In the present emergency regulations similar powers to arrest are given by similar words. Clearly in those cases the constable is not to be judge in his own cause.

I need not multiply citations or give further illustrations of what is so familiar in our law and has been for many, many years, but the whole basis in these cases is that the jurisdiction of the court is invoked to decide a triable issue within its legal competence. What is reasonable in the particular case is then determined by what the court or the jury thinks reasonable. On the view that I have formed that there is under reg. 18B no triable issue as to reasonableness for the court, these authorities cease to be of any value. As the administrative plenary discretion is vested in the Home

(1) [1938] A. C. 305.
(2) [1916] 2 K. B. 621.
(3) [1923] 2 K. B. 400.
(4) [1901] 2 K. B. 576.
(5) [1937] A. C. 797.

Secretary, it is for him to decide whether he has reasonable grounds and act accordingly. No outsider's decision is invoked, nor is the issue within the competence of any court. The legislature must vest the emergency discretion in someone, and I have explained my opinion that the Secretary of State has been chosen as being the only appropriate person. He alone can have the materials for exercising the discretion. Like other discretions it must involve some latitude of choice. There is no hard and fast issue of fact, such as there is in the trial of a specific charge on indictment. In our modern system of government the Home Secretary, though he is not in these matters amenable to the court, and though impeachment has been obsolete for over a century, still is generally responsible to Parliament quite independently of his duty under reg. 18B, para. 6, to report to Parliament at least once a month as to the action he has taken, including the number of persons detained and the number of cases each month in which he has declined to follow the advice of the committee, which is some check, though it may be said that this is not a very effective check, because he is not required to give the names of those detained. But, if the sense of the country was outraged by the system or practice of making detention orders, or, indeed, by any particular order, it could make itself sufficiently felt in the Press and in Parliament to put an end to any abuse and Parliament can always amend the regulation.

It was, however, contended on behalf of the appellant that a different construction must be adopted by reason of comparing the language of reg. 18B in its present form with its language when it was originally made on November 23, 1939 (St. R. & O., No. 1681). Counsel for the appellant knew English law too well to contend that they were entitled to refer to what passed in debate in the House of Commons or the House of Lords. That is clearly inadmissible, if, indeed, anything relevant was said on the point in Parliament about which I know nothing. In *Local Government Board* v. *Arlidge* (1), Lord Haldane L.C. said, in reference to a conflict of opinion whether guidance was to be found in the analogy of procedure in a court of law: "Which

(1) [1915] A. C. 130.

"of these opinions was right can only be determined by "referring to the language of the legislature. Here, as in "other cases, we have simply to construe that language and "to abstain from guessing at what Parliament had in its "mind, excepting as far as the language enables us to do "so." In *Assam Railways and Trading Co., Ld.* v. *Inland Revenue Commissioners* (1) it was observed, "It is clear "that the language of a minister of the Crown in proposing "in Parliament a measure which eventually becomes "law is inadmissible." But an earlier measure which is superseded by the measure in question may be referred to as a historical fact and as giving information as to some evil or defect which was being remedied. The point which was emphasized by the appellant in this appeal was that the language used in the earlier form of the regulation was different in that it omitted the word "reasonable." The clause was: "The Secretary of State, if satisfied with respect to any "particular person that with a view to preventing him from "acting in any manner prejudicial to the public safety or the "defence of the realm it is necessary to do so may make an "order." It is, as I apprehend, not contested that under this earlier form of the regulation the matter was left to the discretion of the Secretary, but it was contended that the change from "if satisfied" to "if he has reasonable cause "to believe" made all the difference and converted the plenary power of the Secretary into a power the exercise of which was subject to the judgment of a court of law. Such, it was said, was the compelling force of the word "reasonable" that by itself it overrode every consideration, however peremptory, and that it inexorably excluded the idea of a merely executive discretion and introduced the opinion of a court instead. I have already rejected that construction of the actual language in the present form of the regulation. The actual language is the acid test, and I see no ground for attaching so much weight to so slight a difference in words. "Satisfied" must mean "reasonably satisfied." It cannot import an arbitrary or irrational state of being satisfied. I find the distinction

(1) [1935] A. C. 445, 458.

between "reasonably satisfied" and "has reasonable cause "to believe" too tenuous. The original reg. 18B was very much slighter and shorter in all respects. That is at once apparent by comparing the words I have quoted from it with the words of the later edition of the regulation. There was nothing in the former corresponding to paras. 4, 5 and 6 of the latter, which are obviously important safeguards for the objector. I do not find in the later edition any indication of evils to be cured, but, if defects are to be remedied, it was to be done by extending the Home Secretary's power on the one hand, and on the other enlarging the specified safeguards of the subject. It does not in terms provide for review by the court.

In my opinion, if it was ever intended to make so drastic a change in the whole scheme as to make the Home Secretary's grounds of belief examinable by a judge, it should and would have been enacted by express words. I attach little importance in this context to the question whether the words used are "satisfied" or "has reasonable cause to believe." For instance, both phrases seem to be used indifferently in para. 1A of reg. 18B which was added on May 22, 1940. Nor can I derive any light from comparing or contrasting the use in different places of these regulations of phrases like " it appears," " is satisfied," " has reasonable cause." This collection of regulations is more like a fasciculus of different enactments, many made at different dates, than a single statute. Even in the same statute the same word may be used in different senses at different places, as was recently held by this House in *Barnard* v. *Gorman* (1). It is also old and familiar law that words which in one statute are given a particular meaning are not necessarily to be construed when they are found in another statute as having the same meaning. This principle of construction is discussed in *Cox* v. *Hakes* (2), especially by Lord Halsbury L.C. (3). The present form of reg. 18B is different in material particulars from the original form, and must be construed as it stands. I think the correct construction is that which I have put on it.

(1) [1941] A. C. 378, 384.
(2) (1890) 15 App. Cas. 506.
(3) Ibid. 516, 517.

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Finally the principles applied by this House in *Rex* v. *Halliday* (1) are, in my judgment, equally applicable to reg. 18B.

I must shortly deal with two minor matters that have been adverted to. In the first place, para. 8 of the regulation does not, in my opinion, render lawful a detention which is, apart from para. 8, unlawful and unwarranted by the Secretary's powers. It is inserted to settle possible doubts as to prison law and practice. The other matter for comment is the decision in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria* (2), where the government claimed to exercise certain powers, including deportation, against the appellant. The appellant applied for a writ of habeas corpus, on the ground that the ordinance relied on gave by express terms the powers it contained only against one who was a native chief, and who had been deposed, and where there was a native custom requiring him to leave the area, whereas actually not one of these facts was present in the case. It was held in effect that the powers given by the ordinance were limited to a case in which these facts existed. It was a question of the extent of the authority given by the ordinance. That depended on specific facts, capable of proof or disproof in a court of law, and unless these facts existed, there was no room for executive discretion. This authority has, in my opinion, no bearing in the present case, as I construe the powers and duties given by the regulation. There are also obvious differences between the ordinary administrative ordinance there in question and an emergency power created to meet the necessities of the war and limited in its operation to the period of the war. The powers cease with the emergency. But that period still continues and, it being assumed that the onus is on the respondents in this action of unlawful imprisonment, the onus is sufficiently discharged, in my opinion, by the fact of the order having been made by a competent authority within the ambit of the powers entrusted to him and being regular on its face.

I agree with the decision of the courts below and am of opinion that the appeal should be dismissed.

(1) [1917] A. C. 260. (2) [1931] A. C. 662.

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LORD ROMER. My Lords, the decision of this appeal must, as it seems to me, turn ultimately upon the true meaning of a few words in para. 1 of reg. 18B of the Defence (General) Regulations made under the Emergency Powers (Defence) Acts, 1939 and 1940. The clause is as follows: "If the "Secretary of State has reasonable cause to believe any person "to be of hostile origin or associations or to have been recently "concerned in acts prejudicial to the public safety or the "defence of the realm or in the preparation or instigation of "such acts and that by reason thereof it is necessary to exercise "control over him, he may make an order against that person "directing that he be detained."

The question of construction arising under the regulation is this. Before an order can be made by the Secretary of State is it necessary that there should in fact exist reasonable grounds for his belief, or is it sufficient that there are grounds for his belief that appear to him to be reasonable? The form in which that question is brought before your Lordships for decision in the present case is somewhat unusual. The appellant is a gentleman who, ever since May 29, 1940, has been detained in Brixton Prison by reason of an order dated May 26 and purporting to have been made under the regulation by Sir John Anderson when Home Secretary. The order is prefaced by a recital as follows: "Whereas I have reasonable "cause to believe Jack Perlzweig alias Robert Liversidge to be "a person of hostile associations and that by reason thereof "it is necessary to exercise control over him." On March 14, 1941, the appellant began this action as plaintiff against Sir John Anderson as the first defendant and Mr. Morrison (who had succeeded Sir John as Home Secretary on October 4, 1940) as second defendant, claiming as against both defendants damages for false imprisonment and as against Mr. Morrison an injunction restraining him from continuing the imprisonment of the appellant. In due course the appellant delivered his statement of claim. In it he stated that Sir John Anderson had by a " document " dated May 26, 1940, and " expressed " to be a detention order under the regulation ordered and directed him to be detained. He then alleged that in consequence and by reason of the said order and direction he had been and still was detained and imprisoned and that since October 4, 1940, his detention and imprisonment had been continued by Mr. Morrison who refused to release him. He concluded his allegations as follows (para. 6): "In the "premises the defendants have and each of them has caused "and procured the unlawful detention and imprisonment of "the plaintiff and the second named defendant continues and "intends to continue the same." It is to be observed that inasmuch as the appellant is plainly alleging that he is detained in consequence and by reason of the order of Sir John Anderson given by the document expressed to be an order under the regulation, his assertion that his detention was and is unlawful must necessarily mean that the document was not a valid order. He does not, however, state in what respect the document is invalid and on that pleading it would have been open to him to attack it upon several grounds, as, for example, that the regulation was ultra vires, or that Sir John did not honestly believe that the appellant was of hostile associations and that by reason thereof it was necessary to exercise control over him, or that, if Sir John did so believe, there did not exist in fact any reasonable grounds for such belief. It might indeed have been the appellant's case, for all that appears to the contrary on the statement of claim, that he was attacking the validity of the order on the ground of non-compliance by the Home Secretary or the chairman of the advisory committee with the duty imposed on them respectively by cl. 4 and 5 of reg. 18B. In these circumstances the respondents might reasonably have applied for particulars of the alleged invalidity of the order. They did not do so, however, and delivered their defence which contained among others the following paragraphs: "(3.) The defendants admit that the first named "defendant ordered that the plaintiff should be detained under "reg. 18B of the Defence (General) Regulations, 1939. (5.) "None of the allegations contained in para. 6 of the statement "of claim is admitted . . . ."

Thereupon the appellant issued a somewhat remarkable summons. He asked by it that para. 3 of the defence should be struck out on the grounds that it purported to admit something that was not pleaded in the statement of claim. He asked alternatively that the respondents should be ordered to give the following particulars of such para. (*a*) of the grounds on which Sir John Anderson had reasonable cause to believe the appellant to be a person of hostile associations and (*b*) of the grounds on which Sir John Anderson had reasonable cause to believe that by reason of such hostile associations it was necessary to exercise control over the appellant. But para. 3 of the defence contained no allegation, express or implied, that Sir John Anderson believed the appellant to be a person of hostile associations or believed that by reason of his hostile associations it was necessary to exercise control over him. The paragraph merely contained an admission that Sir John Anderson had ordered the appellant to be detained under reg. 18B. Nor was there any ground that I can see for striking it out. The master very properly dismissed the summons, and the appeal against his order was dismissed by Tucker J. The appellant then appealed to the Court of Appeal. Before that court the appellant abandoned his claim to have para. 3 of the defence struck out, but he obtained leave to amend his summons by asking that the particulars should in the alternative be given under para. 5 of the defence. There was some sort of justification for seeking this alternative relief inasmuch as the refusal to admit that the detention of the appellant was unlawful impliedly asserted that it was lawful, and, accordingly, that there were in fact reasonable grounds for the belief of the Home Secretary recited in the order, assuming that, according to the true construction of the regulation, the existence in fact of such reasonable grounds was essential to the validity of the order. On the pleadings as they stood, however, there was nothing to indicate that the appellant was attacking the validity of the order on the want of such reasonable grounds, and, if he were not, the existence or non-existence of those grounds was not an issue in the action. But the appellant's summons might, perhaps, be regarded as serving the double purpose of giving particulars of his statement of claim, and of asking for particulars of the defence. The

Court of Appeal must, I think, have so regarded it, for they proceeded on the footing that the existence or non-existence in fact of such reasonable grounds was put in issue by the pleadings and merely addressed their minds to the question whether on the trial of that issue the onus of proof would lie on the appellant or on the respondents. The court decided that it would lie on the appellant and dismissed the appeal solely upon that ground.

My Lords, it is, I think, apt to lead to confusion if the question be regarded as one of onus. The appellant having been detained by or by the direction of the respondents, the onus of justifying the detention clearly lies on them. The real question to be decided is how that onus is to be discharged. Is it discharged by production of the order purporting to be made by Sir John Anderson under the regulation, or must the respondents prove in addition that the order was justified in the circumstances? The Court of Appeal decided that mere production of the order was (in the first instance at any rate) sufficient. "If at the trial," said MacKinnon L.J., "the "plaintiff merely proved that he was detained in prison by "an order of the first defendant and nothing more, and if the "defendants then proved that he was detained by an order "issued pursuant to the regulation and signed by the first "defendant . . . . and if that was the whole of the evidence "we think there must be judgment for the defendants."

If the Court of Appeal were right in thinking that mere production of the order and proof of the signature of Sir John Anderson would sufficiently discharge for the time being the onus that lay on the respondents of justifying the detention, the appellant's application for particulars at this early stage of the action was rightly dismissed. But even if the view entertained by the Court of Appeal as to the production of the order be accepted, it would merely result in postponing to a later date the decision of the crucial question in the case. For it is obvious that at the trial the appellant would not be content with merely proving that he was detained in prison. He would assuredly call some evidence in support of his case that he was not a person of hostile associations, and thereupon, as the Court of Appeal foresaw, the respondents might, on one construction of the regulation, have to call rebutting evidence, and the further trial might even have to be postponed if such evidence proved embarrassing to the appellant by way of surprise or novelty. "Conceivably," added MacKinnon L.J., "in a proper case, the judge might at that stage make some "order by way of particulars of the allegations of the "defendants." Sooner or later, therefore, and in some form or another, the question would have to be decided whether the respondents could be compelled to disclose the grounds on which the belief of Sir John Anderson was founded, in other words, the question whether before an order can be made under the regulation there must exist in fact reasonable grounds for the belief of the Home Secretary on which the order is founded or whether it is sufficient that he bona fide believes that there are such grounds. If the latter construction is to prevail, no order for particulars such as the appellant seeks in this case can be made. For, if at the trial the Home Secretary gives rebutting evidence to the effect that, in his opinion, there were reasonable grounds for his belief, his statement, being merely a statement as to his opinion, must necessarily have to be accepted unless it can be shown that he was not acting in good faith, and the onus of showing this would lie upon the appellant. The materials on which the Home Secretary founded his opinion would be wholly irrelevant and could not be inquired into by a court of law. The question what is the proper construction of the regulation, a question that does not appear to have been discussed in the Court of Appeal, is, therefore, one of considerable importance: for the considerations to which I have just referred will apply to the case of every person who is detained by an order made under the regulation, whether he seeks to question the validity of the order by an action for false imprisonment or by an application for a writ of habeas corpus.

My Lords, that this question is not only of importance but is also one of considerable difficulty appears sufficiently from the fact that it has given rise to a difference of opinion among your Lordships. But after giving the matter my most earnest consideration I have come to the clear conclusion that the construction for which the respondents are contending must be accepted. The arguments in favour of the other construction addressed to this House as well by the counsel for the appellants in the present case as by the counsel for the appellants in the case of *Greene* v. *Secretary of State for Home Affairs* (1) are undoubtedly of considerable force, but to accede to them would, or might in certain cases, lead to a result that neither Parliament nor the framers of the regulation could by any possibility have intended. Take, for instance, the case of a person against whom an order for detention has been made because the Secretary of State believes him to have been recently concerned in acts prejudicial to the public safety or the defence of the realm. If that person brings an action for false imprisonment or moves for a writ of habeas corpus the Secretary of State may be placed in the dilemma of having to make public information the disclosure of which may imperil the security of this country or of having to refuse to disclose it with the result that the person detained, who may be a dangerous "Fifth "Columnist," will be released and set at liberty to continue his traitorous activities. For, if the question whether the Secretary of State had reasonable grounds for the belief on which his order was founded is one for a court of law to determine, it is plain that the court must be placed in full possession of all the relevant facts, and if some of those facts are withheld from it, even though it be by reason of public policy, it will have no option but to say that no reasonable grounds for his belief have been shown to exist, and the release of the detained person will follow as a matter of course. The Emergency Powers (Defence) Act, 1939, and the regulation will in that particular case have failed to remedy the mischief against which they were designed. What that mischief was sufficiently appears from s. 1, sub-s. 1, of the Act. So far as is material for the present purpose, it is in these terms: "His Majesty may by Order in Council make such regulations

(1) Post, p. 284.

"as appear to him to be necessary or expedient for securing "the public safety, the defence of the realm . . . . and the "efficient prosecution of any war in which His Majesty may be "engaged." Moreover, Part I. of the regulations made in pursuance of the section, in which Part regulation 18B is to be found, is entitled " Provisions for the Security of the State." It was, indeed, said on behalf of the appellant in *Greene's* case that where an Act of Parliament is capable of more than one construction, the courts will adopt that construction which is the least likely to lead to an invasion of the liberty of the subject. That in general is a very salutary rule, but we are dealing here with an Act passed and regulations made under it in times of a great national emergency, and in view of this circumstance and of the objects which that Act and those regulations so plainly had in view, the courts should, in my opinion, prefer that construction which is the least likely to imperil the safety of this country. In this connection it is not inapposite to quote the following passage from the speech of Lord Atkinson in *Rex* v. *Halliday* (1): " However precious the personal liberty of the subject may "be, there is something for which it may well be, to some "extent, sacrificed by legal enactment, namely, national "success in the war or escape from national plunder or "enslavement."

It was urged on behalf of the appellant that there is no reason to fear that the Secretary of State will ever find himself placed in the dilemma to which I have referred, inasmuch as the trial of an action for false imprisonment or the proceedings in habeas corpus can always be heard in camera. So they can, but I am not at all impressed by this argument. Where the information in the possession of the Secretary of State is of such a nature that this country might be seriously prejudiced if it came to the ears of the enemy, the serious risk of leakage would inevitably deter him from disclosing it. A man who is willing to risk his liberty and his life in maintaining a traitorous intercourse with the enemy is not likely to be deterred from passing on such information

(1) [1917] A. C. 260, 271.

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by the penalties attaching to a disclosure of what has taken place at proceedings in camera.

It was strongly urged on behalf of the appellant that the expression "if he has reasonable cause to believe" and similar expressions are well known to English law which has consistently regarded them as postulating the existence in fact of reasonable grounds for belief. I will assume that this is so, but the context and circumstances in which they are used may force one to the conclusion that even the most familiar words and expressions are used in other than their ordinary meaning, and this is the case here. For the person who is to have reasonable cause to believe is not some minor official holding a subordinate position. He is the Secretary of State. The acts, moreover, concerning which the belief is to be entertained are not some infractions of our municipal law committed in times of peace. They are (among others) acts prejudicial to the public safety or the defence of the realm committed in a time of grave national danger and of such a nature that "by reason thereof" it is necessary to exercise control over the person suspected of committing them. Whether or not the acts of some individual appear to be of this description is a question of which the Secretary of State must plainly be a better judge than any court of law can be. "It "seems obvious" said Lord Finlay L.C. in *Rex* v. *Halliday* (1), "that no tribunal for investigating the question whether "circumstances of suspicion exist warranting some restraint "can be imagined less appropriate than a court of law." I respectfully agree. I cannot believe that the legislature or the framers of the regulation ever intended to constitute the courts of this country the ultimate judges of the matters in question. On the contrary, there are to be found in the language both of the statute and the regulation indications that the final determination of all such matters was to lie with the Secretary of State alone. By s. 1, sub-s. 2, of the Act, for instance, it is provided among other things that regulations may be made for the detention of persons whose detention "appears to the Secretary of State to be expedient

(1) [1917] A. C. 260, 269.

"in the interests of the public safety or the defence of the "realm." It does not, of course, follow that, because there was authority given to clothe the Secretary of State with this wide discretionary power, the regulation has in fact done so. But the sub-section indicates the views of the legislature as to the powers that ought to be given him to secure the safety of the realm and it is not unreasonable to suppose that the framers of the regulation desired to give full effect to these views. It is, moreover, to be observed in this connection that whereas paras. 3, 4 and 5 of reg. 18B provide for the setting up of one or more advisory committees to whom a person aggrieved by the making of an order against him can make his objections, it is made plain by para. 6 that the Secretary of State need not follow the advice given by any such committee. It is also to be noticed that the words of para. 1 are not "if there *is* reasonable cause to believe," but, "if "the Secretary of State *has* reasonable cause to believe." It is, of course, true, as has been said by my noble and learned friend Lord Atkin, that the words "if a man has a broken "ankle" do not and cannot mean "if he thinks he has a broken "ankle," but the regulation is not dealing with the state of a man's body. It is dealing with the state of man's belief, in other words with the state of his thoughts. The words "if a man has a belief that a certain thing exists" necessarily mean "if he thinks that the thing exists," and the word "has" may well have been used in the regulation to indicate that it is throughout concerned with the impression that is created on the mind of the Secretary of State and not with the impression they may produce on a court of law. Not only is the belief to be his. The estimate of the reasonableness of the causes that have induced such belief is also to be his and his alone.

The attention of your Lordships was very properly drawn by way of contrast to the language used in some of the other regulations, such, for instance, as the first para. of reg. 2C, as showing that when it was intended to leave a decision to the unfettered discretion of the Secretary of State the regulations did so in plain terms. There would be more force in this argument if all the regulations were contained in one Act of Parliament or in a set of regulations all framed at one time, though, in view of the fact that different language is frequently employed in the regulations to express the same thing, I should not even in that case have been greatly impressed by it. But the regulations and even some of the clauses in the same regulation came into existence at different times and for all that I know to the contrary were the product of different hands. In these circumstances it is impossible to infer that a difference in the language used in two regulations necessarily indicates an intention to express two different meanings.

My Lords, for these reasons I would dismiss this appeal.

LORD ATKIN. Mr. Holmes, nothing has been said so far about costs. This is a matter of very general importance, and I think the majority of their Lordships—I am a third party in this respect—are rather of opinion that it is not a case in which costs should be asked for.

Holmes for the respondents. If your Lordship pleases; of course, in those circumstances I should not dream of asking for them on behalf of the Home Secretary. I do not know, my Lords, whether I ought to say that I did notice that my Lord Maugham's speech ended by proposing the motion that the appeal should be dismissed with costs. Possibly that had escaped your Lordship's notice; but perhaps that can be rectified.

LORD ATKIN. It had not escaped my notice, and that is the reason I put the question to you.

Holmes. If your Lordship pleases.

Appeal dismissed.

Solicitors for appellant: *Buckeridge & Braune.*
Solicitor for respondents: *Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)* GREENE . . . . APPELLANT;

1941

Sept. 23, 24; Nov. 3.

AND

SECRETARY OF STATE FOR HOME AFFAIRS . . . . RESPONDENT.

Emergency legislation—Detention of person—"Hostile origin or "associations" — Habeas corpus — Justification of detention — Production of order of Home Secretary—Need of affidavit by Home Secretary — Error by advisory committee — Defence (General) Regulations, 1939, *reg.* 18*B*, *paras.* (1.), (8.).

Acting under regulation 18B, para. (1.), of the Defence (General) Regulations, 1939, the Home Secretary made an order for the detention of the appellant, stating therein that he did so because he had reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him:—

Held, that the production of the Home Secretary's order, the authenticity and good faith of which were not impugned, constituted a complete answer to an application by the appellant for a writ of habeas corpus, and no affidavit by the Home Secretary justifying his cause of belief was necessary; and that a mistake on the part of the advisory committee, to whom the appellant made objection against the detention order under para. (3.) of reg. 18B, in failing to give the appellant, pursuant to para. (5.) of the regulation, the correct reasons for his detention, did not invalidate the order for detention.

Decision of the Court of Appeal, [1942] 1 K. B. 87, affirmed.

APPEAL from the Court of Appeal affirming an order of a Divisional Court refusing an application for a writ of habeas corpus (1).

On May 22, 1940, Sir John Anderson, then Home Secretary, made the following order for the detention of the appellant: "Whereas I have reasonable cause to believe Ben. Greene, "of The Hall Cottage, Berkhamsted, to be a person of hostile "associations and that by reason thereof it is necessary to "exercise control over him, Now, therefore, I, in pursuance of

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(1) [1942] 1 K. B. 87.

* *Present*: VISCOUNT MAUGHAM, LORD ATKIN, LORD MACMILLAN, LORD WRIGHT and LORD ROMER.

"the power conferred on me by reg. 18B of the Defence "(General) Regulations, 1939, hereby make the following "order: I direct that the above-mentioned Ben. Greene be "detained." On May 24 the appellant was detained in Brixton prison under the order of May 22 and he continued to be detained under that order, and afterwards by the order and direction of Mr. Herbert Morrison, the succeeding Home Secretary. A copy of Sir John Anderson's order was stated to have been given to the appellant, but he was incorrectly informed by the advisory committee, to whom he made objections against the order under para. (3.) of reg. 18B, that the ground on which he had been detained was that he had been "recently concerned in acts prejudicial to the public safety "and the defence of the realm, and in the preparation of such "acts."

On March 26, 1941, the appellant applied ex parte to the Divisional Court for a writ of habeas corpus. In support of his application he made an affirmation in which he denied that he was or had been at any time of hostile associations. On April 22, in reply to the appellant's affirmation, Sir John Anderson swore an affidavit, in which he stated: " (3.) Before "I made the said order I received reports and information "from persons in responsible positions who are experienced "in investigating matters of this kind and whose duty it is "to make such investigations and to report the same to me "confidentially. I carefully studied the reports and considered the information and I came to the conclusion that "there was clear cause to believe, and I did in fact believe, "that Benjamin Greene was a person of hostile associations "and that by reason thereof it was necessary to exercise "control over him. (4.) A copy of the detention order was "sent by me to the advisory committee appointed under "reg. 18B of the Defence (General) Regulations, 1939, on "May 31, 1940. I am unable to say how the error occurred ". . . . in the statement of my reasons for making the order. ". . . . I submit that the error cannot have prejudiced Mr. "Greene, as he had a copy of the detention order and . . . . "he took no exception before the advisory committee to the "terms of the document. The advisory committee duly "reported to me. After again considering all the information "about the case, including the committee's report, I was "confirmed in my belief that Mr. Greene was a person of "hostile associations and that by reason thereof it was necessary to exercise control over him." An affidavit was also sworn by the respondent, Mr. Morrison, who succeeded Sir John Anderson as Home Secretary, in the following terms: "I have read a copy of the affidavit of Sir John Anderson ". . . . and I desire only to add that I have satisfied myself "that the said Benjamin Greene was and is a person of hostile "associations, and that by reason thereof it is necessary to "exercise control over him." On April 24 the appellant made a further affirmation in answer to the affidavits of Sir John Anderson and Mr. Morrison. In it he stated: "I deny "that there is a clear cause to believe, or that the said Sir John "Anderson does in fact believe that I am a person of such "hostile associations that it is necessary to exercise control "over me. The said Sir John Anderson gives no information "to the court of the names of the 'persons in responsible "'positions' and I say this is not evidence that this honourable "court can accept. I crave that this honourable court will "insist on its right to have before it the evidence the said Sir "John Anderson purported to act upon. With reference to "para. (4.) of the said affidavit I deny that the error therein "referred to has not prejudiced me. . . . . The procedure "before the advisory committee was such that I had no means "of giving any explanations of the alleged facts upon which "any reasonable grounds of belief could be based . . . . At "no time was I given information as to which particular "activities or associations were relied upon to constitute the "said grounds [of detention]. I say, therefore, that even "after the hearing before the advisory committee the Secretary "of State had not, and could not have had, reasonable grounds "to believe anything which warranted my continued detention. "I have read what purports to be a copy of the affidavit of "Mr. Herbert Morrison . . . . It is untrue to say that he has "satisfied himself that I am a person of hostile associations.

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"My original detention and its continuance have every "appearance of being due to political animosities, and are in "the nature of political persecution." The appellant's application was adjourned for notice to be given to the Home Secretary and on May 2, 1941, the Divisional Court refused the application. The Court of Appeal dismissed an appeal against that decision.

Greene appealed to this House.

St. John Field K.C. and *J. W. Williamson* for the appellant. In *Secretary of State for Home Affairs* v. *O'Brien* (1) Lord Birkenhead said, referring to the writ of habeas corpus, "We are "dealing with a writ antecedent to statute, and throwing its "roots deep into the genius of our common law. The writ with "which we are concerned to-day was more fully known as "habeas corpus ad subjiciendum. This writ, however, was "one of many. Thus there was a writ ad respondendum, ad "satisfaciendum, ad prosequendum, ad testificandum, and "ad deliberandum. All these writs exhibited many features "in common; but the most characteristic element of all was "their peremptoriness. To-day the substitution of more "modern remedies has left the writ ad subjiciendum, more "shortly known as the writ of habeas corpus, in almost "exclusive possession of the field. It is perhaps the most "important writ known to the constitutional law of England, "affording as it does a swift and imperative remedy in all "cases of illegal restraint or confinement. It is of immemorial "antiquity, an instance of its use occurring in the thirty-"third year of Edward I. It has through the ages been "jealously maintained by courts of law as a check upon the "illegal usurpation of power by the executive at the cost "of the liege." This language should be kept carefully in mind, and the courts should be astute to prevent any improper exercise of power on the part of the executive. Powers must not be exceeded: Halsbury's Laws of England, 2nd ed., vol. vi., para. 435, p. 389. In *Metropolitan Asylum District Managers* v. *Hill* (2) it was said by Lord Blackburn that the burden "lies

(1) [1923] A. C. 603, 609.

(2) (1881) 6 App. Cas. 193, 208.

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"on those who seek to establish that the legislature intended "to take away the private rights of individuals, to shew "that by express words, or by necessary implication, such an "intention appears." While theoretically our legislature can do anything it chooses to do, it is not to be imputed to it that it has abrogated constitutional liberties unless this has been done either expressly or by clear implication. There is no exception to that general rule. The present case is not one of preventive detention, but is imprisonment in a very real sense. In *McArdle* v. *Egan* Lord Wright said (1): "What "has to be considered in such a case is whether there is "reasonable and probable cause for suspicion. That language "dates from the earliest times." The Secretary of State must in fact have good cause for acting. It is not sufficient that he thinks he has good cause. No return to a writ of habeas corpus is good unless it enables the court to judge whether there was in fact reasonable cause for depriving the person detained of his liberty: see Blackstone's Commentaries, 8th ed., vol. iii., pp. 129 et seq. In *Bushell's Case* (2) a return was held bad because it did not show whether the decision was right or wrong.

The detention of the appellant cannot be regarded as legal unless there was reasonable cause for it, and it is for the Home Secretary to satisfy the court of that; and he has not done so.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the respondent. If the Secretary of State honestly believes that a person is (inter alia) of hostile associations he can make an order for the detention of that person, and the production and proof of that order is good unless and until its invalidity can be shown. The fact that the Home Secretary can make an order for the detention for an indefinite time supports the view for which we contend. If it had been intended that the validity of the regulation should depend upon a particular standard being shown very different language would have been used. The Home Secretary is entitled to make use of his accumulated knowledge and experience in exercising control over certain classes of persons; he is closely in touch with the particular situation, and it cannot have been

(1) (1933) 150 L. T. 412, 414.

(2) (1670) Vaughan 135.

contemplated that a subjective test should be applied by the court. The words " reasonable cause " have been substituted for " must be satisfied." In any view the production of the order was a sufficient return.

Field K.C. replied.

The House took time for consideration.

1941. Nov. 3. VISCOUNT MAUGHAM (read by Lord Macmillan): My Lords, this is an appeal from an order of the Court of Appeal dated July 30, 1941, confirming an order of the King's Bench Division dated May 2, 1941, refusing the application of Benjamin Greene (the appellant) for a writ of habeas corpus to issue. The appellant is at present detained in His Majesty's Prison, Brixton, under an order dated May 22, 1940, purporting to be made by Sir John Anderson, the then Secretary of State for Home Affairs, under reg. 18B of the Defence (General) Regulations (being regulations made under the Emergency Powers (Defence) Act, 1939).

The question for decision on the appeal to your Lordships is whether the appellant is entitled to have a writ of habeas corpus issued directed to the respondent. The Divisional Court (Humphreys, Singleton and Tucker JJ.) decided in the negative, and their judgment was affirmed by the Court of Appeal (Scott, MacKinnon and Goddard L.JJ.).

The appellant according to modern practice (R. S. C., Or. LIX.) applied ex parte to the Divisional Court for the issue of the writ and his application was adjourned to be heard after notice to the respondent. The appellant filed evidence in support of his application, making (so far as now material) two submissions. The first was that the order was and is bad because Sir John Anderson never had reasonable or any cause for believing that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The second was based on a very regrettable error made by the chairman of the advisory committee appointed under reg. 18B, para. (3.), or his officer,

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in informing the appellant of the grounds on which the order had been made against him (reg. 18B, para. (5.). He submitted that he had been prejudiced in his hearing before the advisory committee by reason of this circumstance.

I shall deal first with the question whether a writ of habeas corpus ought to be issued. My Lords, a somewhat similar appeal to this House in *Liversidge* v. *Anderson* (1) has just been decided. It was based on an order of detention made by the Secretary of State under reg. 18B of the Defence (General) Regulations and it raised the same question as to the true construction of the words "If the Secretary of State "has reasonable cause to believe" etc. Your Lordships there decided that the words, in the context in which they are found, refer simply to the belief of the Secretary of State based on his view as to there being reasonable cause for the personal belief which justifies the detention order. That opinion is, of course, binding on your Lordships, and none the less that in the earlier appeal the question arose in an action of false imprisonment while here it arises on an application for a writ of habeas corpus. Your Lordships also expressed the opinion that the Secretary of State could not be called on to disclose his information or grounds of belief if he took the view that it would be contrary to the public interest to do so. These two propositions must be borne in mind in considering the propriety of acceding to the application for the issue of a writ of habeas corpus.

My Lords, I am certain that this House would be very unwilling to curtail or diminish the rights of an applicant for a writ of habeas corpus ad subjiciendum, but we are, of course, sitting in a judicial capacity and are bound by the law as it exists. It is inaccurate to say, as some have said, that the writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. What the judges of the High Court can do at the instance of the imprisoned person is to command the production of the person and to inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released, but there are

(1) Ante, p. 206.

many cases, and in particular those of a criminal, or supposed criminal, character, in which a return to the writ (to use the old-fashioned phrase) cannot be traversed or impeached by affidavit: *Carus Wilson's Case* (1); *Ex parte Lees* (2); *In re Newton* (3). On the other hand, in cases other than those which relate to some criminal or supposed criminal matter and except cases of imprisonment for debt or by process in any civil suit, the judge is empowered by the Habeas Corpus Act, 1816 (56 Geo. 3, c. 100, s. 3), although the return to the writ be sufficient in law, to examine into the truth of the facts therein set forth by affidavit or by affirmation, and, if the truth of the facts returned appear to him doubtful, he may bail the party and transmit the writ, return, etc., to the court of which he is a judge, whereupon " it shall be lawful for the said court to "proceed to examine into the truth of the facts set forth in the "return in a summary way by affidavit," etc., " and to order "and determine touching the discharging," etc.

In my opinion, the present case is within ss. 3 and 4 of that Act, since no charge of a criminal or supposed criminal nature is brought against the appellant and it is not within the other exceptions mentioned in the Act. The order relied on in the return is an order made by a Secretary of State purporting to act under reg. 18B made pursuant to and within the provisions of the Emergency Powers (Defence) Act, 1939. It is, however, not an order of a court of justice, for the Secretary of State was acting as an executive officer in a matter of administration. It is important to note that his good faith in the matter is not challenged. The only fact, therefore, which could be examined as regards its truth pursuant to the terms of the Act (assuming the order itself to be admitted or proved) is whether the Secretary of State had reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him. At common law apart from the Act of 1816 the return could not be disputed. The proper court to examine the alleged fact under the modern practice (R. S. C., Or. LIX.) is the

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(1) (1845) 7 Q. B. 984.
(2) (1858) E. B. & E. 828.
(3) (1855) 16 C. B. 97.

Divisional Court. Affidavits were filed on both sides. The court accepted the accuracy of the statements in the affidavits of Sir John Anderson and of the respondent and thought there was ample evidence to enable the court to come to the conclusion that Sir John Anderson had reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him. I should hesitate to differ from the Divisional Court in such a case, but I must add that, in my opinion, this conclusion, which was also that of the Court of Appeal, was right. If so, it follows that the return was a good return, that the application for the writ properly failed, and that this appeal must be dismissed.

We have been asked to express an opinion whether any affidavit by the Secretary of State was necessary, and this question is a little more difficult. Those who desire to understand the history and practice in relation to the writ of habeas corpus prior to the Act of 1816 must study the very learned and elaborate opinion on the writ of habeas corpus delivered by Wilmot C.J. on May 9, 1758, to the House of Lords (Opinions and Judgments delivered by Sir John Eardley Wilmot, 1802, pp. 77 to 129). The tenth question was whether the judges were bound by the facts set forth in the return, " although it "should appear clearly by the clearest proof that the return "was false in fact." In his opinion, Wilmot C.J. dealt, first, with cases of imprisonment for criminal offences and next with imprisonment in civil matters. In the former cases he points out that it is impossible to go out of the return if the court who had dealt with the case had jurisdiction in the matter, and that the court on habeas corpus must accept the facts stated in it as true. At p. 107 he observes in very simple and apposite language: " The court says, (to the gaoler) ' tell the reason why "'you confine him.' The court will determine whether it is a "good or bad reason; but not whether it is a true or a false "one. The judges are not competent to this inquiry; it is "not their province but the province of a jury, to determine "it: ' ad questionem juris, non facti, judices respondent '." He adds " The writ is not framed or adapted to litigating facts :

"it is a summary short way of taking the opinion of the court "upon a matter of law, where the facts are disclosed and "admitted; it puts the case exactly in the same situation as "if an action of false imprisonment had been brought, and the "defendant had set forth a series of facts to justify the imprisonment and the plaintiff had demurred to the plea." Wilmot then says (p. 112): "I find no authority which "warrants a difference between returns, when filed to writs "of habeas corpus in cases of private custody, and of public "custody, where the facts justifying the imprisonment have "been set forth; that is, where there has been a full, complete, "sufficient return." He then goes through the various cases which justified his view and showed that a return good on its face and with no affidavit in support of it could not be disputed on the application for the writ. The return, he said (p. 127), was "sacred" and could not be touched but by consent.

There were, however, applications for the writ in many cases where the custody was of a private nature, e.g., cases relating to custody of infants, confinement of alleged lunatics, committals for contempt of privilege by either House of Parliament, claims by slaves to be freed, and even applications by husbands seeking to recover possession of their wives. And special attention had been drawn to cases of impressment for military service: see Wilmot, p. 81; and to the powers exercised too often by incompetent commissioners in bankruptcy to commit bankrupts and others to gaol for long periods. As the result of long agitation for reform the Habeas Corpus Act, 1816, became law. It is curiously framed. (See for a full statement of the Act the judgment of Lord Halsbury L.C. in *Cox* v. *Hakes* (1).) So far as the question of the power of the court to examine the return to the habeas corpus is concerned, it is dealt with in ss. 3 and 4 of the Act, but the sections are confined to cases where persons have been confined or restrained of their liberty otherwise than for some criminal or supposed criminal matter and except persons imprisoned for debt or by process in any civil suit. Thus, in these excepted matters the return (in general) was and is still conclusive. In the other cases, which were plainly under

(1) (1890) 15 App. Cas. 506, 515.

habeas corpus at common law, the judge was given power "to "examine into the truth of the facts set forth" in the return although the return "be good and sufficient in law" (s. 3). But the judge was not directed in all cases to make this examination, and he has still and always has been treated as having to exercise a discretion in the matter: see *Hobhouse's Case* (1) for the proposition that the writ at common law was "not "grantable of course." I will mention two of the decisions which show that this view is correct.

In the case reported as *Carus Wilson's Case* (2) the court (Lord Denman C.J., Patteson, Williams and Wightman JJ.) decided that, on a return to a writ of habeas corpus by the Viscount and Gaoler of Jersey who were detaining the body of the applicant by virtue of a sentence of the Royal Court of Jersey for a contempt, they were not entitled to go into the question whether the law of Jersey authorized the sentence or the detention. They declined to receive affidavits for the purpose of seeing whether the detention was lawful and (I emphasize these words) " whether the proceeding was under statutes 31 "Car. 2, c. 2, or 56 Geo. 3, c. 100, or at common law." Patteson J. observed that, if the proceeding was under the statute 56 Geo. 3, c. 100, the question would be: " What are the affidavits which "we can receive? This is a return, made by officers (not by "a court; a court never makes a return), that the prisoner is "in custody by sentence of the court." That, he said, could not be questioned, and so the court decided.

A like question was considered by the King's Bench in the well known *Case of the Sheriff of Middlesex* (3). There the serjeant at arms of the House of Commons had detained the prisoners on a warrant signed by the Speaker of the House stating that the prisoners had been guilty of a contempt and breach of the privileges of the House. The judges did not decide that the case was within the provisions of the Act of 1816, though for my part I cannot see why any doubt was entertained in that matter, nor did they base their decision on the ground that the House of Commons was a court. What they did decide was that the return was a sufficient answer and put an end to the case and that the court could not go into the question of contempt on affidavit, nor discuss the motives which might be alleged for the order. Lord Denman C.J. (1) makes a somewhat ambiguous statement that s. 3 of 56 Geo. 3, c. 100, was "not applicable." I think he must have meant that in the case of the return setting up the warrant of the Speaker it would not be right to examine further into the validity of the warrant. Littledale J. puts this very clearly. He said "If "the warrant declares the grounds of adjudication, this court, "in many cases, will examine into their validity; but, if it "does not, we cannot go into such an inquiry. Here we must "suppose that the House adjudicated with sufficient reason; "and they were the proper judges." (See also *Hobhouse's Case* (2) and *Leonard Watson's Case* (3).) This case related (inter alia) to a return made by a gaoler as regarded a prisoner who had not been convicted, but on his confession had been placed in custody by executive action.

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(1) (1820) 3 B. & Ald. 420.
(2) 7 Q. B. 984.
(3) (1840) 11 A. & E. 273.

In the present case I think the order itself is a sufficient answer and we must presume that the Secretary of State, acting under a regulation having the force of law, had what he considered reasonable cause for his belief. I agree with what Goddard L.J. in his careful judgment said on this point (4): "I am of opinion that where on the return an order or warrant "which is valid on its face is produced it is for the prisoner to "prove the facts necessary to controvert it, and in the present "case this has not been done. I do not say that in no case is "it necessary for the Secretary of State to file an affidavit. "It must depend on the ground on which the return is con-"troverted, but where all that the prisoner says in effect is "'I do not know why I am interned. I deny that I have done "'anything wrong,' that does not require an answer because "it in no way shows that the Secretary of State had not "reasonable cause to believe, or did not believe, otherwise."

These conclusions were, of course, intended to apply to an order not made by a court of law, but made by an officer

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(1) 11 A. & E. 273, 291.
(2) 3 B. & Ald. 420.
(3) (1839) 9 A. & E. 731, 782, 785, 786.
(4) [1942] 1 K. B. 87, 116.

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entrusted by Parliament with the making of such an order. I will add that in the present case the circumstance that the Secretary of State is entitled to withhold from the court the grounds or some of the grounds on which he formed his belief constitutes a further reason why, if there had been no affidavit by the Secretary of State, the Divisional Court would have acted wisely in refusing the application for the writ. It would be useless to attempt to examine the truth of the fact alleged in the order in a case where the fact relates to the personal belief of the Secretary of State, formed partly at least on grounds which he is not bound to disclose. In the present case, therefore, there was, in my judgment, no necessity for an affidavit by the Secretary of State, when once the order itself was proved or admitted, but I am not attempting to lay down a general rule.

The other point argued before your Lordships can I think be dealt with shortly. I agree with all the judges who have considered this case that the appellant has not shown that he was prejudiced by the error in the document sent to him by the Advisory Committee. I also agree with their view that a mistake in that document could not in any event invalidate the original detention or render its continuance invalid.

For these reasons I think the appeal fails and should be dismissed.

LORD ATKIN (read by Lord Wright). My Lords, for the reasons contained in my opinion in *Liversidge* v. *Anderson* (1), I concur in the motion that the appeal be dismissed.

LORD MACMILLAN. My Lords, the main contention of the appellant before your Lordships, as before the courts below, was that the production of the Secretary of State's order of May 22, 1940, was not a sufficient justification of his detention. He argued that, while it was, no doubt, for the Secretary of State in the first instance to make up his mind whether he had reasonable cause to believe the relevant matters, he was not the final judge and must satisfy the court that he had in

(1) Ante, pp. 206, 246, 247.

fact such cause as would induce belief in an ordinary reasonable man. To enable the court to judge of this he must produce the information on which he formed the belief which he professed to entertain.

My Lords, in the case of *Liversidge* (1), in which your Lordships have to-day given judgment, the same broad issue was the subject of consideration and this House has decided that the interpretation which the appellant seeks to place on the language of the regulation is in law untenable. I do not propose to repeat the reasons which I advanced in support of the view which the House adopted. They are equally applicable to the present case. The Secretary of State is not bound to disclose or to justify to any court the grounds on which he conceived himself to have reasonable cause to believe that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The result, in my opinion, is that the production of the Secretary of State's order, the authenticity and good faith of which is in no way impugned, constitutes a complete and peremptory answer to the appellant's application. It justifies in law his detention in the absence of any relevant challenge of its validity, and there is no such challenge. It necessarily follows that the Secretary of State had no need to submit an affidavit. I would only remark that if, contrary to my view, the law required him to justify the reasonableness of his cause of belief, an affidavit such as he submitted in this case would not enable the court to pass judgment on the matter, for it does not set out the information which he possessed when forming his belief. It is only an assurance of the thoroughness of the investigation which he made, not a disclosure of what that investigation yielded.

A second point was taken by the appellant. It appears that he availed himself of his right under the regulation to make objections against the detention order to an advisory committee, and your Lordships have before you a document emanating from the advisory committee which considered the appellant's objections. It is entitled " Reasons for order

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(1) Ante, p. 206.

"under Defence Regulation 18B in the case of Benjamin "Greene" and it opens by stating that the order "was made "against you, Benjamin Greene, for the following reasons: "The Secretary of State has reasonable cause to believe that "you have been recently concerned in acts prejudicial to the "public safety and the Defence of the Realm and in the "preparation and instigation of such acts and that it is "necessary to exercise control over you." The document then proceeds to set out particulars in six paragraphs. On a comparison of the reason for the appellant's detention as stated by the advisory committee with that which is set out in the Secretary of State's detention order, a most unfortunate discrepancy is at once apparent. The Secretary of State believed that the appellant was a person of hostile associations and that by reason of this it was necessary to exercise control over him. The advisory committee, on the other hand, investigated the appellant's case on the footing that it was something else and something much graver that the Secretary of State believed against him. No explanation is forthcoming of this very serious error. Nothing could be more unfortunate than that in a matter in which scrupulous accuracy is imperative the impression should be created that the safeguards prescribed for the protection of detained persons are carelessly observed and administered. The Court of Appeal has found that the appellant has not suffered any material prejudice by reason of the error, but this does not condone it, nor does the Court of Appeal in any way condone it. I have, however, to point out that what is before your Lordships is an application for a writ of habeas corpus and that the appellant's complaint is that he has been and is being detained without any legal warrant. The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the appellant's application. It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is ex hypothesi under lawful detention. Consequently the mistake affords no ground for invalidating the detention order and does not help the appellant in his present application. The error is fortunately not irremediable, and your Lordships have the consolation of an assurance from the Attorney-General that an opportunity will be given to the appellant, if he so desires, to lay his objections afresh before another advisory committee which will have before it the true reason for his detention.

I concur in the motion that the appeal be dismissed.

LORD WRIGHT. My Lords, the appellant applied for a writ of habeas corpus to obtain release from detention to which he was subjected under an order made as in pursuance of reg. 18B, of the Defence (General) Regulations, 1939. It was not questioned that the regulation was validly made under the Emergency Powers (Defence) Act, 1939. The appellant is at present detained at H.M. Prison, Brixton, under the order, which was made by Sir John Anderson, the then Home Secretary, and was dated May 22, 1940. When Sir John Anderson retired from the office of Secretary of State, the respondent succeeded to the office and in exercise of his duties as Secretary of State for Home Affairs has continued the detention of the appellant. On March 21, 1941, the appellant, being still detained, in support of an application for a writ of habeas corpus made an affirmation in which he gave an account of his activities and opinions in order to show that neither Sir John Anderson nor the respondent had reasonable cause or any cause to believe that he was a person of hostile associations. He applied that a writ of habeas corpus should be issued directed to Sir John Anderson and the respondent. The former by affidavit sworn on April 22, 1941, deposed that before he made the order he had received reports and information from persons in responsible positions who were experienced in investigating matters of the kind, and whose duty it was to make such investigations and report the same to him confidentially, and that he carefully studied the reports and considered the information and came to the conclusion that there was clear cause to believe and he did in fact believe that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The respondent on the same day swore an affidavit deposing that he had satisfied himself that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The appellant then, in an affirmation made on April 24, 1941, demanded that the court should insist on its right to have before it the evidence on which Sir John Anderson acted. He gave further details of his career and his opinions and produced testimonials to his character directed to show that there was no reasonable cause for the belief of the Home Secretary and in substance that the order was bad. He also claimed to be released on a subsidiary ground, which was that when he was to appear before the advisory committee he was given a document purporting to contain certain reasons for the order, but that document incorrectly recited the order, because it stated that the Secretary had reasonable cause to believe that he had been recently concerned in acts prejudicial to the public safety and defence of the realm and in the preparation and instigation of such acts and that it was necessary to exercise control over him. The particulars set out in the document were six in number, and several of them were relevant to a case of hostile associations. The courts below, while deploring and condemning the error, decided that it was impossible to hold in the circumstances that it had prejudiced the appellant or invalidated the actual order which was made, though the courts were of opinion that the appellant should be given an opportunity of a further hearing before an advisory committee differently constituted from that before which he had appeared. The Attorney-General has not raised any objection to this course. I feel very strongly that in a question like this affecting the liberty of the subject the greatest care should be taken and the greatest correctness of procedure observed. Laxity is most reprehensible, whoever may have been responsible. The appellant has not so far availed himself of the opportunity afforded him, which is still available to him. I see no reason to differ from the opinion of the court below that this irregularity does not vitiate the order made and continued.

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On the main point, both the Divisional Court and the Court of Appeal have decided against the appellant. I agree with that decision for reasons which I shall briefly state.

The writ of habeas corpus is an ancient common law writ, which from about the end of the sixteenth century or the earlier years of the seventeenth century came to be used as the normal procedure for protecting the liberty of the subject against unlawful arrests and detainments, in particular those by order of the executive. The history of this great remedial writ is succinctly but lucidly and accurately described in Sir William Holdsworth's History of English Law, vol. ix., 2nd ed., pp. 112 to 124. I am merely concerned here with limited aspects. The common law adapted the old writ habeas corpus ad suscipiendum et recipiendum to the purpose of securing the subject's right to immunity from arbitrary arrest and imprisonment save by due process at law. In its earlier use, the writ had been from old days one of the procedural or mesne process writs. The right to freedom which the writ was directed to vindicate was said to be secured by the famous words of Magna Carta, a translation of which was embodied in the Petition of Right of 1628, s. 3: "And where also by the "statute called 'The Great Charter of the Liberties of "'England' it is declared and enacted that no freeman may "be taken or imprisoned, or be disseised of his Freehold or "Liberties or his Free Customs, or be outlawed or exiled, "or in any manner destroyed but by the lawful judgment of "his Peers or by the Law of the land." This provision was reiterated in the Petition of Right because of the refusal of the Court of King's Bench to grant the writ in *Darnel's Case* (1), where the return that the arrest was per speciale mandatum domini regis was held to be a good return, which meant that a lawful cause of imprisonment was shown. We are told, no doubt with good reason, that the judges were influenced by the opinion that some degree of prerogative power was necessary to enable the Crown to deal with emergencies. The decision and arguments are analysed by Sir William Holdsworth, op. cit., vol. vi., 2nd ed., p. 34 and seq.

(1) (1627) 3 St. Tr. 1.

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But the Petition of Right declared such a cause of imprisonment to be unlawful. In the same way it was enacted, in the Act of 1640 abolishing the Star Chamber, that any person committed or imprisoned by order of the Star Chamber or similar bodies should have his habeas corpus.

It is clear that the writ of habeas corpus deals with the machinery of justice, not the substantive law, except in so far as it can be said that the right to have the writ is itself part of substantive law. It is essentially a procedural writ, the object of which is to enforce a legal right. The writ is described as being a writ of right, not a writ of course. The applicant must show a prima facie case that he is unlawfully detained. He cannot get it as he would get an original writ for initiating an action, but if he shows a prima facie case he is entitled to it as of right. The first question, therefore, in any habeas corpus proceeding is whether a prima facie case is shown by the applicant that his freedom is unlawfully interfered with, and the next step is to determine if the return is good and sufficient. A person unlawfully detained is entitled as of course to obtain a writ of trespass, but an action of trespass or false imprisonment does not by itself secure the immediate or speedy release of the plaintiff, if he is still detained when he commences his action. As Littledale J. said in *Leonard Watson's Case* (1), " A party imprisoned has "two modes of proceeding, either by action for false imprison- "ment or by application for a habeas corpus. In an action "for false imprisonment the defendant must prove his "justification, if any, and (except where allowed by express "provision to give it under the general issue) he must also set "forth the justification specially on the record. In the return "to an habeas corpus no such minuteness of detail is necessary, "nor in any instance that I can find has it been considered "necessary to support the return by affidavit." The incalculable value of habeas corpus is that it enables the immediate determination of the right to the applicant's freedom. On this aspect I may refer to the discussion by Lord Halsbury L.C. in *Cox* v. *Hakes* (2). He said: " In days

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(1) 9 A. & E. 731, 795.

(2) 15 App. Cas. 506, 514.

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"of technical pleading no informality was allowed to prevent "the substantial question of the right of the subject to his "liberty being heard and determined. The right to an instant "determination as to the lawfulness of an existing imprisonment, and the twofold quality of such determination that if "favourable to liberty it was without appeal and if unfavourable it might be renewed until each jurisdiction had in turn "been exhausted have from time to time been pointed out by "judges as securing in a marked and exceptional manner the "personal freedom of the subject. It was not a proceeding "in a suit but was a summary application by the person "detained. No other party to that proceeding was necessarily "before or represented before the judge except the person "detaining and that person only because he had the custody "of the applicant and was bound to bring him before the judge "to explain and justify, if he could, the fact of imprisonment. "It was, as Lord Coke described it, festinum remedium." When in the Habeas Corpus Act, 1816, the court was given power, if it sees fit, in the cases to which the Act applies, to inquire into the truth of the facts set out in the return, it was to be in a summary way, by affidavit or affirmation (s. 3). The efforts of the courts aided by the legislature by means of the Acts of 1679 and 1816, have invariably been directed to prevent evasion and delay in the proceedings such as the alias or pluries writ or the cruder course of removing the person detained out of the jurisdiction and to make them effective in the shortest possible time. I have adverted to these features of the Habeas Corpus Act because I shall later have to deal with some questions of the procedure.

I have emphasized the use of the writ to secure freedom from arbitrary or unlawful arrest by the government, but besides these public occasions it was employed in connection with private arrests and detainments so that the writ applies to indefinitely wider and more various exigencies, indeed to any case whatever in which the liberty of the subject is unlawfully interfered with. Without any attempt to make a catalogue, I may mention the case of persons impressed into the navy in days when certain legal powers of impressment existed, and the case of persons arrested or committed by decree of a court said to be without the necessary jurisdiction. Many other instances might be given. The procedure is not limited to the acts of public or judicial officers or acts of administration. It extends to purely personal matters. Thus, for instance, in *Reg.* v. *Jackson* (1), the writ was issued against a husband restraining his wife's personal freedom on the ground that the husband had no legal right to shut up his wife in order to enforce restitution of conjugal rights. The procedure is frequently used to decide who is entitled to the custody of an infant or person under disability, as in *Reg.* v. *Barnardo* (2). It is said that in such cases it is not strictly a question " of liberty, "but of nurture, control, and education" in the words of Lord Esher, but it does involve determining who is entitled in law to the care of and control over the child. In this House, where the case was entitled *Barnardo* v. *Ford* (3), it was held that an appeal was competent, as the infant must be under someone's control, and a further inquiry into the facts was ordered. The inestimable value of the proceeding is that it is the most efficient mode ever devised by any system of law to end unlawful detainments and to secure a speedy release where the circumstance and the law so require.

The main question then in this appeal is whether there is a legal cause of detainment. What is relied on by the respondent is the order under reg. 18B or more accurately the order of Sir John Anderson when Home Secretary, coupled with the adoption of it by the respondent when he in turn became Home Secretary. The contention on behalf of the appellant is that the order is not sufficient on its face to constitute a good return because it can only be effective if the Home Secretary had reasonable cause to believe, and that the validity of the order depended on the court being satisfied that in fact such grounds existed. The appellant, accordingly, in his affirmation challenged the respondent to state the evidence on which he proceeded.

(1) [1891] 1 Q. B. 671.
(2) Ibid. 194, 204.
(3) [1892] A. C. 326.

Lord Wright.

Until that was done and the reasonable cause established, the order, he contended, was inoperative and the detention was without lawful authority. The respondent, on the other hand, contended that the order, together with its adoption by the respondent, was a good return and that the detention was lawful.

There was a further subsidiary, but not unimportant, point, which is whether an affidavit is necessary in making the return. The Attorney-General has contended that it is not. In addition, a middle course has been discussed, which is that while on the one hand the order is not a sufficient return, some statement, I suppose, on oath, of the evidence on which it is based and on which the respondent acted is necessary, so that if the respondent is debarred by the exigences of official secrecy from disclosing all his reasons, he must at least disclose sufficient to satisfy the court that he had reasonable cause to believe.

As the appeal has been argued without specific reference to form or technicalities, I can state in few words my opinion to be that the detention is lawful and the answer of the respondent constitutes a good and sufficient return. The lawfulness of the detention depends on what is the true construction of reg. 18B. I explained my opinion on that matter in *Liversidge's* appeal (1), which your Lordships have just decided. I need not here repeat at length the conclusion I reached or the reasons which I gave in that appeal. It is enough here to say that the regulation gives to the Secretary of State a plenary discretion to make a detention order against the appellant if he has in his own mind and according to his own judgment reasonable cause to believe that the appellant is a person of hostile associations and that by reason thereof it is necessary to exercise control over him. In making the order Sir John Anderson exercised that plenary discretion, and the respondent, when he succeeded him as Home Secretary, exercised the same plenary discretion when he adopted the order and continued the detention. The order relied on by the respondent is ex facie good and valid. Its authenticity is not disputed. It is not said that the appellant is not the person intended. The order itself justifies the detention. No affidavit verifying or explaining it is necessary, any more than it was in the *Case of the Sheriff of Middlesex* (1). The warrant there was one of commitment by the House of Commons. Lord Denman C.J. said: "On the motion for a habeas corpus, "there must be an affidavit from the party applying; but the "return, if it discloses a sufficient answer, puts an end to the "case: and I think the production of a good warrant is a "sufficient answer." I think that this applies to the present case. The order made by the Home Secretary in the terms of reg. 18B speaks for itself. It is admissible as a public executive document to show a good cause of the detention and needs no extrinsic justification. It is good on its face unless and until it is falsified. There is no doubt a complication because the original order was made by Sir John Anderson, and the respondent did not issue a fresh order, but merely adopted the order which he found in operation. He deposes in his affidavit to this fact, but I do not think that an affidavit from him was necessary. His statement would have been enough, at least in the first instance and until it appeared to the court that sufficient reason was shown to question it and to exercise its power to inquire into the merits under s. 3 of the Act of 1816. In *Leonard Watson's Case* (2) there was no warrant to the actual jailer. The return consisted of a long statement of facts, not put on affidavit or affirmation. The court held that no affidavit was necessary. There must be many cases in which the return is not a warrant or official order, but a narrative of facts. Such a case was *Reg.* v. *Jackson* (3), where it appears that in the first instance the return was in the form of a statement of the facts, though affidavits were filed on the subsequent inquiry. Until there emerges a dispute of fact into which the court feels it should inquire, I think the defendant's statement is enough, though, no doubt, if the court is proceeding to inquire into the merits, it may order affidavits. The guiding principle of habeas corpus is, as I have explained, that it is festinum remedium. Hence there is a presumption against unnecessary affidavits. In the words of Dicey (Law of the Constitution, 8th ed., p. 217), " There is no difficulty, and there is often very little "gain, in declaring the existence of a right to personal "freedom. The true difficulty is to secure its enforcement. "The Habeas Corpus Acts have achieved this end, and have "therefore done for the liberty of Englishmen more than "could have been achieved by any declaration of rights." Simple as the proceeding is, it has been so effective as to be universally applauded and adopted by all common law jurisdictions. If the remedy was kept so free from technicality in days which generally favoured technicality, it must a fortiori be kept as simple and expeditious as possible in these more practical times. The new rules under Or. LIX. of the Rules of the Supreme Court do not affect this matter.

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(1) Ante, p. 206.

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(1) 11 A. & E. 273, 291.
(2) 9 A. & E. 731.
(3) [1891] 1 Q. B. 671.

In the present case there are no facts to inquire into. The only possible inquiry of fact, when once the authenticity of the order and its application to the appellant is conceded or established, is whether the Home Secretary had in his own mind what appeared to his mind to be reasonable cause. It is true that, in Lord Bowen's phrase, the state of a man's mind is as much a fact as the state of his digestion. If the Home Secretary were to misrepresent the state of his mind, that would be fraud, but that is out of the question here and need not be considered.

It would be superfluous to point out that the basis of the conclusion here adopted is that the order and statement are good on their face, that is, that they show a competent exercise of a lawful authority. If an order or warrant is bad on its face, it can give no legal justification for the imprisonment. Thus, in *Bushell's Case* (1), a commitment which showed that it was to punish persons for giving a verdict of which the court did not approve and which was said to be "contra plenam et manifestan evidentiam et contra direc-"tionam curiae in materià legis," was held to be bad as showing a cause which was not lawful. It was pithily observed (2)

(1) Vaughan 135.

(2) Ibid. 136.

that the writ of habeas corpus was then (1670) "the most usual "remedy by which a man is restored again to his liberty if he "have been against law deprived of it." Similarly, in *Rex* v. *Browne* (1), a warrant was held to be bad on its face because the warrant was under the King's own hand, without seal or the hand of any Secretary or officer of State or justice. In the same way, where the return consists of a narrative of facts, it will be bad if the facts stated do not show a legal cause for the detention, as in *Reg.* v. *Jackson* (2).

It may be objected that the discretionary powers thus vested in the Secretary of State are just those which were upheld in *Darnel's Case* (3) by the Court of King's Bench and condemned in the Petition of Right. But the answer is that they are here lawful under this regulation because they are conferred by the supreme authority of Parliament and are thus the law of the land. This distinguishes the effect of reg. 18B, and, similarly, its prototype reg. 14B made under the Defence of the Realm Consolidation Act, 1914, which was discussed by this House in *Rex* v. *Halliday* (4), from the legal position when habeas corpus is suspended by Act of Parliament, the only mode by which it can be suspended. In the latter case the detention is still unlawful apart from further enactment, and an action of false imprisonment or criminal proceedings are not barred, unless the suspension of habeas corpus is accompanied by a statutory indemnity. Otherwise, in such cases the remedy alone is suspended to the extent prescribed by the Act.

Reference has been made to *Rex* v. *Secretary of State for Home Affairs. Ex parte Lees* (5). There the Home Secretary had made an order under reg. 18B. The applicant in his affidavit referred to the order and also exhibited the reasons served on him for the purpose of a hearing before the advisory committee in accordance with para. (5.) of the regulation. The Home Secretary made affidavits in reply stating that he had received and studied reports and information and on

(1) (1686) Shower (K. B.) 484.
(2) [1891] 1 Q. B. 671.
(3) 3 St. Tr. 1.
(4) [1917] A. C. 260.
(5) [1941] 1 K. B. 72.

consideration had come to the conclusion that in the national interests it was necessary to make the order. The Court of Appeal rejected the idea that the court could be made to act as a court of appeal from the discretion of the Secretary of State or inquire into the cause of his belief or consider if he had a reasonable cause for his belief. I agree with this view, but I wish to add that I do not think that it was necessary to have affidavits from the Home Secretary at all in that case. The case was relied on before your Lordships as showing that it was. I do not so understand it, looking at it as a whole, but, if that appears from anything in the case, I do not agree for reasons which I have explained.

In my judgment, the appeal should be dismissed.

LORD ROMER. My Lords, in *Liversidge* v. *Anderson* (1) your Lordships have just decided that, according to the true construction of para. (1.) of reg. 18B, made under the Emergency Powers (Defence) Acts, 1939 and 1940, the words "If the Secretary of State has reasonable cause to believe" do not mean "if there is in fact reasonable cause for his "belief," but "if he is of opinion that there is such cause." In the present case, it is plain that Sir John Anderson was of opinion that there was reasonable cause for his belief, and that he did honestly believe, that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. It necessarily follows that so far as the appellant relies on the absence of proof that there was in fact reasonable cause for such belief the appeal must fail.

It only remains to deal with the mistake in the document emanating from the advisory committee in professed pursuance of the duty cast upon the chairman of the committee by para (5.) of the regulation. The mistake, of which no explanation has been given to your Lordships, was most regrettable. But it cannot affect the validity of the order that had been made by the Home Secretary nearly two months before. Had the appellant been prejudiced by the mistake the court might nevertheless have afforded him some relief.

(1) Ante, p. 206.

But the matter was carefully considered both by the Divisional Court and the Court of Appeal. They came to the conclusion that the appellant had not been in any way prejudiced by the mistake, and I am satisfied that their conclusion was right.

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Oswald Hickson, Collier & Co.*
Solicitor for respondent: *Treasury Solicitor.*

[HOUSE OF LORDS.]

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Oct. 20, 21, 27, 28, 30; *Nov.* 1; *Dec.* 15.

BRACKENBOROUGH . . . . APPELLANT;

AND

SPALDING URBAN DISTRICT COUNCIL . RESPONDENTS.

Market—Cattle—Escape of steer—Fatal injuries to person on highway—Liability of market authority.

The provision of pens in a market by a market authority is not a duty undertaken in discharge of obligations to the general public, but is a convenience for improving the management and organization of the market, and any liabilities which may arise therefrom are not to the public at large, but to those who make use of the pens in, or who resort to, the market.

A steer escaped from a pen in a public market, and in the highway knocked down and fatally injured the appellant's husband:—

Held, that the market authority was not under any liability to the widow of the deceased man.

Decision of the Court of Appeal [1940] 1 K. B. 675 affirmed.

APPEAL from the decision of the Court of Appeal.

The facts as stated by the Lord Chancellor were as follows. The respondents under an ancient franchise conducted a weekly cattle market on the highway in the borough of Spalding. For the convenience of those resorting to the market they provided pens for the accommodation and segregation of cattle awaiting sale or grading. Those pens were placed in the highway on both sides of New Road in the borough. The right of the respondents so to occupy the highway was to be presumed to be an incident of their franchise. The pens were temporary structures erected on market days and removed at the close of business. They were of various kinds: (*a*) four-sided enclosures consisting of wooden posts and rails; (*b*) three-sided structures formed of iron uprights fixed in sockets in the ground with two taut chains across each of the three sides, the fourth side being entirely open; and (*c*) structures identical on three sides with those last-mentioned but having a loose chain affixed to one of the posts on the fourth side which might be hooked to the opposite post across the opening. When so hooked, the chain was not taut but sagged to some extent. It was with a pen of this third type that the present case was concerned.

**Present*: VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD PORTER.

On April 12, 1939, Mr. Proctor, a farmer and cattle breeder in the neighbourhood of Spalding, sent in twenty-one two-year-old steers to the market, twenty of them for grading and one for sale. They were driven to the market by two of his employees, a farm labourer named Pentelow and a farm lad named Walton. The steers arrived at the market rather before noon and were met there by Mr. Proctor's foreman, Frank Brackenborough. Certification was timed to begin at 2.30, at the conclusion of the sales. Meantime, the steers were, by direction of an official, placed in two pens of the third type already described, and, after they had entered, the loose chain was hooked across the open end of each pen. Pentelow and Walton stood by to look after their charges. One of the steers managed to get its head under the slack chain and, as Pentelow put it, "nipped out" into the street and got away, in spite of Pentelow's efforts to prevent it. The steer was pursued by Walton. Brackenborough, who had been standing not far away, joined in the pursuit. In the course of the animal's career through the town Brackenborough endeavoured to stop it, but it charged him and knocked him down on the highway, causing him injuries so serious that he died in hospital a few hours later. It was common ground that Brackenborough should, for the purposes of the case, be regarded as an ordinary member of the public who happened to be on the highway when the steer encountered him. The fact that he was an employee of Mr. Proctor, the owner of the steer, and was attending the market on his master's business was, therefore, to be left out of account as having no bearing on the issue. The appellant, Brackenborough's widow, instituted proceedings against the respondents for damages under Lord Campbell's Act and also under the Law Reform (Miscellaneous Provisions) Act, 1934. The case came on for trial at Lincoln Assizes before Cassels J., and a jury. The learned judge did not put separate questions to the jury, but after discussing various issues directed them to consider generally whether the defendants were negligent in providing a pen which was not reasonably secure. The jury returned a general verdict in favour of the appellant and awarded damages under both heads. The resultant total for damages was adjusted and was not now in dispute. The verdict and judgment were set aside by the Court of Appeal (Slesser, MacKinnon, and Goddard L.JJ.), who ordered judgment to be entered in favour of the present respondents. The appellant now sought to have the verdict and judgment in her favour restored by the House.

Sandlands K.C. and *Van Oss* for the appellant. Those who for profit provide appliances such as pens in a cattle market are liable to a member of the public who is injured through the escape of an animal from a pen in consequence of its unsafe condition. They are bound to take such precautions as will prevent the escape of an animal. By the Markets and Fairs (Weighing of Cattle) Act, 1887, s. 4, in every market or fair at which tolls are taken, the market authority must provide and maintain sufficient and proper buildings for weighing cattle brought there, and by the Markets and Fairs (Weighing of Cattle) Act, 1891, s. 2, the market authority must provide "sufficient and suitable accommodation for "weighing cattle." Further, under the Cattle Industry (Emergency Provisions) Act, 1934, the Livestock Industry Act, 1937, and the Cattle Subsidy Scheme (Approval) Order, 1937 (St. R. & O., 1937, No. 659), sch., para. 5, the respondents were placed under a duty to provide reasonably sufficient pens to prevent the escape of cattle brought for certification. Brackenborough was injured in trying to capture an animal which had escaped owing to the defectiveness of the pen provided by the market authority. He was acting reasonably and in accordance with his duty. The respondents were liable for the injury caused to a member of the public by their breach of duty in failing to provide a pen reasonably sufficient

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to prevent the escape of the animal placed in it. They relied on *Lax* v. *Darlington Corporation* (1) and *Deen* v. *Davies* (2).

Wallington K.C. and *Winning* for the respondents. The market authority were not liable for Brackenborough's death, and the judge should have withdrawn the case from the jury. For the purpose of grading cattle the market site was handed over to the certifying authority, which carried on its work independently. Further, the true cause of the escape of the animal was not any negligence on the part of the respondents but the failure of Pentelow and Walton to keep a proper watch on it. There was no evidence that the respondents owed any duty in law to the deceased man, nor that the pen was unsafe, nor that the animal was at any time under the control of the respondents.

VISCOUNT SIMON L.C. My Lords, the respondents, the urban district council of Spalding, enjoy and exercise an ancient franchise in virtue of which they conduct a weekly cattle market on part of the highway in the borough of Spalding. Domesday Book (folio 351b of vol. i. of 1783 edition) records that at Spalding (Spallinge) there was a market worth forty shillings, part of the possessions which the Conqueror took from Earl Algar and gave to his henchman Ivo Taillebois: names which revive memories of Kingsley's Hereward the Wake. It is, presumably, a development of this same market which is the locus of the events giving rise to the present litigation. In addition to the ordinary use of Spalding market for the sale and purchase of cattle, the market is also an approved certification centre for the purpose of grading fat cattle whose owners desire to obtain certificates qualifying for the subsidy provided under the Live Stock Industry Act, 1937. Some cattle are brought to the market for this latter purpose only and not for sale. The respondents receive certain tolls or payments in respect of both uses. It is unnecessary in the present case to discriminate between these two uses of the market, or to discuss the precise relations subsisting between the respondents and the certifying authority. On this point it is enough to say that a successful application to be appointed a certification centre does not remove from the market authority whatever responsibility properly attaches to it in respect of cattle sent to the market.

Markets have been conducted throughout the length and

(1) (1879) 5 Ex. D. 28.

(2) [1935] 2 K. B. 282.

breadth of England from the earliest times. When, as here, an ancient market is held in a highway, the inference is (as in *Attorney-General* v. *Horner* (1)) that the road was dedicated to the public subject to the exercise of the market rights. Markets naturally vary widely in their character and importance, and some are, no doubt, very primitive in the matter of equipment and facilities. In *Swindon Central Market Co., Ld.* v. *Panting* (2) will be found an instance of a market held in a public street in which there were no stalls or pens at all. In *Draper* v. *Sperring* (3), where the owner of a market held in the street placed hurdles for the purpose of penning sheep on market days, Willes J. observed (4) "It is clear that the proprietor of the market was "under no legal obligation to provide such accommodation "as this." When, in 1934, the respondents applied for and obtained approval of their market as a certification centre under the Cattle Industry (Emergency Powers) Act, 1934, they apparently satisfied the then Cattle Committee that they were "equipped with adequate penning or tying up "accommodation for cattle." This approval has been continued by the Livestock Commission which, under the Livestock Industry Act of 1937, has superseded the previous Cattle Committee: see Cattle Subsidy Scheme (Approval) Order, 1937 (St. R. & O., 1937, No. 659), sch., para. 5. It is obvious, however, that this circumstance does not create any liability to third parties for ineffective penning accommodation, if no such liability would exist without it.

The foundation of any liability in the respondents must be breach of duty, and this is the way in which the case is framed in the statement of claim. Moreover, in order to succeed the appellant must establish that the respondents owed some relevant duty to members of the public (such as the deceased) using the highway outside the ambit of the market, and that Brackenborough met his death owing to a breach of this duty. Even if the circumstances in which the respondents directed, or permitted, the cattle to be put into the pens created some responsibility to their owner for the pens' condition (as might well be the case if there were anything in the structure which injured the cattle, as in *Lax* v. *Darlington Corporation* (5)), this would be nothing to the

(1) (1885) 11 A. C. 66.
(2) (1872) 27 L. T. 578.
(3) (1861) 10 C. B. (N. S.) 113.
(4) Ibid. 123.
(5) 5 Ex. D. 28.

point when the claim is for breach of duty to a member of the public using the ordinary highway. Cassels J., in a full and careful summing-up, directed the jury that the respondents "should provide accommodation that was reasonably safe for "the purpose for which it was used, and that was a duty "which they would owe to the person who brought his cattle "there, to his servants who were engaged in bringing the cattle "there, and looking after them when they were there, and to "the public." It is the last four words of this sentence which would be applicable to the present case, and if the proposition of law therein stated is wrong, the verdict cannot stand. The Court of Appeal, in reversing the decision below, went in large measure on the point that the two drovers, Pentelow and Walton, remained in custody and control of the animals after they were put in the pen (as they undoubtedly did) and appears to have taken the view that in these circumstances those who provided the pen could not possibly be liable. I doubt the validity of this reasoning, for if there really was a duty resting on the market authority and owed to the public to see that animals that came to the market should not escape from the market and do damage to wayfarers outside, or a duty to take reasonable steps to prevent this, the fact that the drovers were not relieved of the duty of guarding them would not seem to be conclusive. With all respect to Slesser L.J., I do not appreciate the bearing of the decision in *Knott v. London County Council* (1) on the situation we have to consider.

But was there such a duty owed to the public? I can see none, and no authority was cited to the House which supports such a proposition. A market for cattle and sheep cannot be treated like a menagerie of lions and tigers (though in the latter case the duty to prevent escape would in any event be of a higher order). Cattle are animals mansuetae naturae, and as a rule are peaceable beasts. From the most ancient times cattle such as these steers have ordinarily been met with on the roads and there is nothing to suggest that the particular animal, which caused this poor man's death, was known to be ferocious or vicious, or was ferocious or vicious in fact. It has been laid down that the occupier of a field bordering the highway is not liable if one of his cattle, which are depastured there, escapes through a defective fence on to the highway and injury results to members of the public using

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(1) [1934] 1 K. B. 126.

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the highway: see *Heath's Garage, Ld.* v. *Hodges* (1). Whatever view may be taken of the correctness of this decision, it is clear that the provision of pens in a market by the market-authority is not a duty undertaken in discharge of obligations to the general public. (Indeed, as above pointed out, it appears that there are markets on the highway without any pens, as in the *Swindon Central Market* case (2).) Such provision is a convenience for improving the management and organization of the market, and the liabilities which may arise from such provision are liabilities to those who use the pens, or resort to the market, and not to the public at large.

This view renders it unnecessary to consider a further difficulty in the way of the appellant as to remoteness of damage. The objection that injury to a wayfarer outside the area of the market after the escaping animal has been chased by various people and has made quite a tour of the neighbourhood may be in any case too remote to fix liability on the market-authority was not, I think, raised in the case, and I do not decide the point. I am content to mention it to avoid the possibility of being regarded hereafter as having in this appeal decided against such an objection. I, therefore, agree with the conclusion reached by the Court of Appeal, though for somewhat different reasons, and I move that this appeal be dismissed.

LORD RUSSELL OF KILLOWEN (read by Lord Thankerton). My Lords, with much of the argument presented on behalf of the district council I disagree. For instance, I can see no foundation for the suggestion that for the purpose of grading cattle the site of the market was handed over to the certifying authority and that the certifying authority carried on the grading independently of the market authority. The council had no power to use or allow others to use their weighing machine and pens, situate as they were on a public highway, except on the footing that such user was an exercise of the council's market franchise. From this it must follow that when the council applied for their "market" to be used as a grading centre, it was not an application merely that the site on which they exercised their franchise should be so used, but that the user as a grading centre should take place while they were exercising their franchise. Further, I am of opinion

(1) [1916] 2 K. B. 370.

(2) 27 L. T. 578.

that no complaint can be made of the judge's summing up, on the score that he failed to put to the jury the council's contention that the true cause of the steer's escape from the pen was not any negligence on the part of the council, but the fact that Pentelow and Walton did not keep a proper watch on the cattle while in the pen. I think the judge put the three possible views clearly to the jury, namely, (1.) that the escape was solely due to the unsafe nature of the pen; (2.) that the escape was due partly to that, and partly to the failure of the men to keep a proper watch on the cattle; and (3.)—here I quote his words—"if you came to the conclusion that the "sole reason it escaped was because the man and the boy "were not properly looking after it, then there would be no "negligence in the defendants [respondents] which led to "the damage."

If the fate of this appeal depended on questions of fact, I would have no hesitation in restoring the judgment entered at the trial. There is, however, a serious question of law which arises for determination. The foundation of this action is (as was admitted by the appellant) the negligence of the council vis-a-vis the dead man, not as a servant of the owner of the steer, but as a member of the public on the highway. The question directly raised is whether the owner of the franchise of a market held on a highway owes any duty to a member of the public using the highway. The learned judge told the jury that the council did owe a duty to the public to provide accommodation reasonably safe for the purpose for which it was used. We must take it that the jury found that the council were in breach of this duty, and negligent in providing an unsafe pen. If the duty exists the judgment should be restored. If there is no such duty the appeal should be dismissed.

My Lords, I know of no authority directly in point, and it certainly is strange, if the duty exists, that throughout the ages in which markets have been held on public highways (the markets in many, if not in most, cases being more ancient than the highways), no case has been recorded in which the duty has been alleged, and established. It has, however, been decided that an owner of land adjoining a highway is under no duty to members of the public using the highway to keep his harmless domestic animals (such as sheep and cattle) from straying on it: see *Heath's Garage, Ld.* v. *Hodges* (1). In

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that case the Court of Appeal, in holding that the duty did not exist, relied on the long continued absence of authority to the contrary. Lord Cozens-Hardy M.R. pointed out (1) that in the course of centuries the straying of sheep and other harmless domestic animals on the highway must have been common, yet there is no trace of any indictment for a nuisance by permitting cattle to stray. In the same case Neville J. (2) used the following language: "We are now in the year 1916, "and during the preceding centuries no such duty has ever "been established against the occupier of land adjacent to "a highway. . . . . No case has ever established liability in "civil courts, and the strongest authority that can be produced ". . . . is a dictum of a learned judge that such an action "might possibly lie, while it seems to me there is a great body "of judicial opinion against it, including that of Vaughan "Williams L.J., Buckley L.J., Kennedy L.J., Bankes L.J., "Fletcher Moulton L.J., and others. In my opinion the "experience of centuries has shown that the presence of "domestic animals upon the highway is not inconsistent with "the reasonable safety of the public using the road." Those views expressed in 1916 are reinforced by the experience of the subsequent twenty-five years. The decision in *Lax* v. *Darlington Corporation* (3) is not in point. It merely decides that there is a duty on the owner of a market franchise to the persons from whom he receives toll for a standing in the market to provide a place which is not dangerous for the purpose for which payment is made: see per Brett L.J. (4).

There is no vicious or mischievous propensity in a steer. It is not an animal which, if un-penned, will be likely to cause damage in accordance with a known propensity. Indeed, the sight of cattle progressing along the highway, and proceeding through villages and towns, is a common incident of country life. To cast on the owners of a market for domestic animals held on the highway the duty of preventing the animals from ever escaping on to the highway, would be placing on them a heavy burden indeed. It is a burden which at this late day and, in the absence of clear authority, I am not prepared to impose. If no such duty was cast upon the council, there was no negligence by them, and the action should have been dismissed. It follows that this appeal must fail.

(1) [1916] 2 K. B. 370, 377.

(2) Ibid. 381, 382.

(3) 5 Ex. D. 28.

(4) Ibid. 33.

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LORD MACMILLAN (read by Lord Thankerton). My Lords, the question for decision may be stated thus: Is the holder of a market franchise, who provides in the highway pens for the accommodation of cattle brought to the market, under a duty to members of the public using the highway to exercise reasonable care that the pens which he provides shall be such as securely to confine the cattle placed in them and prevent their escape? It is noteworthy that, although street markets are among our oldest institutions, no precedent has been brought to your Lordships' notice for the imposition on the holder of a market—the lord of the market, as he is designated in legal parlance—of such a liability to the public as the appellant seeks to establish. This is by no means conclusive against the existence of such a liability, but it places on the appellant the burden of showing that her case is justified in principle.

Having given the matter full consideration, I have been unable to find any legal basis for the duty which it is sought to lay on the respondents. There is not, so far as I am aware, any duty on the holder of a market to provide pens at all. If pens are provided, they are offered, such as they are, for the use of those who bring their cattle to the market, whom I may call the customers of the market. In a question with such customers the market-holder must not offer them pens or assign them standing places which are dangerous to animals placed there: *Lax* v. *Darlington Corporation* (1), but he makes no profession that such pens as he may provide will be proof against the escape of cattle. Some of the pens in the respondents' market are entirely open on one side and could not keep in untended cattle. The pen from which the steer in question escaped had across one of its sides only a single slack and detachable chain and was plainly not designed effectively to prevent cattle placed in it from escaping. If, then, there is no duty on a market-holder to provide his customers with pens from which cattle cannot escape, still less does he owe any duty to the public at large to construct the pens which he may provide so that they shall be proof against the escape of cattle placed in them. The market-holder does not take charge of the cattle that are brought to his market. They remain under the charge of their owners or their owners' representatives, and if the owners of the animals avail themselves of pens provided in the market that does not mean that responsibility for the restraint of animals placed in the pens passes to the market-holder. The market-holder has no previous knowledge of the animals brought to his market or of their propensities, and he has no duty to restrain them.

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(1) 5 Ex. D. 28.

I, accordingly, find myself unable to agree with the direction given by the learned judge to the jury as to the law applicable to this case. He told them that it was the duty of the respondents to provide accommodation which was "reasonably safe "for the purposes for which it was required." He did not in terms define these purposes, but I think that he sufficiently indicated to the jury that what he meant was that the pens provided must be reasonably safe for the purpose of confining cattle placed in them and preventing their escape. The use of the word "safe" was perhaps a little unfortunate because of its implications. "Effective" would have been a better word. The jury under this direction returned a general verdict in favour of the appellant from which it may be inferred that they were of opinion that the pen in question was not "reasonably safe" for the purpose of preventing the escape of cattle placed in it, but, as the respondents, for the reasons which I have stated, owed no duty to the appellant's husband to provide in their market only such pens as should be reasonably effective to prevent the escape of cattle from them, it follows that the verdict cannot stand. The case should, in my opinion, have been withdrawn from the jury in that the evidence disclosed no ground of legal liability on the part of the respondents. I am, therefore, for dismissing the appeal.

Lord Wright. My Lords, claims by persons in respect of injuries caused to them by animals may be based on one or more of three distinct grounds of liability. The first is that known as cattle trespass. The second is based on the dangerous disposition of the animal, either because of its innate character, as in the case of lions, tigers, monkeys and others, or because, though it belongs to the tame or domestic class, it has shown a ferocious disposition, in which case proof of the scienter or of knowledge of its disposition is necessary to establish liability. The liability under these two causes of action, which I need not here discuss, is strict or absolute and does not involve proof of negligence, but outside these classes lies the wide general action for negligence, that is, breach of a duty to take reasonable care for the safety either of particular individuals or of individuals regarded simply as members of the public exercising their ordinary rights either on the highway or elsewhere. This is the widest cause of action. A simple illustration is afforded by a case where an animal has been negligently left unattended on the road or allowed to run loose and has done damage.

The present action is a claim for negligence. There was no cattle trespass, and the animal was not dangerous in any sense. The negligence relied on is strictly defined. The respondents are sued for breach of a duty which, it is claimed, they owe to members of the public to take due care to provide pens in their cattle market such as to prevent the cattle placed in them from escaping and running at large in the streets of the town. No reliance has been placed on the rule enunciated by the Court of Appeal in *Heath's Garage, Ld.* v. *Hodges* (1), that there is no duty on the owner or occupier of land adjoining the highway to prevent animals on it from escaping on to the highway. This rule, so far as I know, is modern. It was apparently unknown to the very eminent common lawyers, Erle C.J., Williams J., Willes J., and Keating J., who formed the court in *Cox* v. *Burbidge* (2). Its limits are still uncertain. Romer L.J., in *Deen* v. *Davies* (3), regarded it as applying to animals depastured on land adjoining a highway. The Irish Court of Appeal in *Howard* v. *Bergin, O'Connor & Co.* (4), did not give effect to it where two bullocks were negligently allowed to escape to the streets of a town. It has also been questioned by eminent lords justices if it could apply to the escape of animals in such numbers as to cause an obstruction, for instance by Vaughan Williams L.J., in *Ellis* v. *Banyard* (5), and it was held by Molony C.J., in *Cunningham* v. *Whelan* (6), not to apply to the circumstances of that case. The appellant, for whatever reason, has not relied on it in this case. The existence, the meaning and the scope of the rule remain open to the consideration of this House, and I express no opinion on it. Nor is it necessary here to consider another question which has been examined in other cases, namely, whether personal injury caused by an animal not of the savage class or known to be ferocious should be regarded as too remote a consequence of its being negligently allowed to escape at large by those in control of it. Mr. Wallington expressly said that he did not rely on any plea of remoteness of damage. I apprehend that he meant to concede that the collision between

(1) [1916] 2 K. B. 370.
(2) (1863) 13 C. B. (N. S.) 430.
(3) [1935] 2 K. B. 282.
(4) [1925] 2 Ir. R. 110.
(5) (1911) 106 L. T. 51, 52.
(6) (1917) 52 Ir. L. T. R. 67.

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the stupid and blundering, but not mischievous, steer and Brackenborough who, in the ordinary course of his duty as the foreman of the farmer who owned the cattle, tried to turn it back and recapture it, was a direct consequence of its being allowed to escape.

Thus, the clean issue is raised whether on the facts of this case the respondents as the keepers or lords of a cattle market owe a duty to the members of the public to take care to provide pens which are reasonably sufficient to prevent the escape from the market of cattle brought there. My noble and learned friend the Lord Chancellor, in his statement of the facts with which I agree, as indeed I agree with his opinion generally, has explained in what respects it was complained that the pens were insufficient for this purpose. The penning accommodation was clearly of a primitive character. The two pens in which were the steers of which the offending animal was one had no fencing in front except a slack chain which a steer seized with an impulse to escape could easily evade by putting his head under it. Some of the pens were completely open at the front. The whole arrangement was makeshift and temporary, removable at the end of each market day and replaceable for the next market. It was typical, indeed, of a transition stage between the old system of a completely open market and the elaborate modern cattle market such as the evidence shows it was intended to construct and instal at Spalding. Presumably, that has already been done.

It is clear that in earlier days cattle markets were held in the open market place or street without any pens at all. As recently as 1872, the report in *Swindon Central Market Co., Ld.* v. *Panting* (1), shows that the cattle market there did not then have pens at all. This also appears from *Lax* v. *Darlington Corporation* (2), where one of the plaintiff's cattle which he had brought to the defendant's market was injured by spiking itself on a dangerous railing in the market. The action was brought by the plaintiff on the principle of *Indermaur* v. *Dames* (3), and it was successfully claimed that the spiked railings were in the nature of a trap endangering the cattle which the plaintiff had been invited to bring into the defendant's market. In *Draper* v. *Sperring* (4), the owner of a market held in a street at Crewkerne appealed against a conviction by magistrates for not removing accumulations of

(1) 27 L. T. 578.
(2) 5 Ex. D. 28.
(3) (1866) L. R. 1 C. P. 274.
(4) 10 C. B. (N. S.) 112.

droppings of sheep caused because she had provided penning and standing for the sheep on the pavement of the street in the market. The conviction was upheld. One defence was that the appellant merely enjoyed her market right according to the grant by receiving tolls from persons having the right to bring sheep there for sale. Willes J. met that contention by pointing out that she not only received the tolls but she made enclosures by means of hurdles on the spot where the nuisance was created. It was in consequence of that restraint of the sheep that the nuisance arose. "It is clear," he said (1), "that the proprietor of the market was under no legal obli-"gation to provide such accommodation as this." As a side-light on historical aspects, I am indebted to Mr. C. T. Clay, the librarian to this House, for a reference to vol. xxxix. of the publications of the Thoresby Society, on Yorkshire Fairs and Markets, at p. 151. The author refers to the advantages possessed by towns which owned rights of weekly markets and fortnightly fairs. "They could," he says, "provide a cattle "market fitted with pens and so abate the nuisance of cattle "and sheep standing in the widest street every market day. "Wakefield, for example, equipped a cattle market in 1765 "and for a century it continued to be used fortnightly." Incidentally, the frontispiece to the same volume is a print of a painting made in 1804 of Masham Market, which shows small groups of cattle standing in the market place without there being any pens.

In my opinion, the true conclusion is that there was no obligation on the respondents at common law to provide any pens at all, and a fortiori no obligation to use reasonable care to provide pens to keep the cattle safe from escaping. Pens were, I think, introduced by market owners, where they were introduced at all, as a voluntary measure for the convenient conduct and management of the market, to keep different lots of cattle apart, to prevent confusion, to secure order and cleanliness, and to avoid the crowding, fouling and disorder of the public street or other place where the market was held which there must be if the cattle were free to stand unpenned anywhere in the market. But penning did not in law necessarily involve an assumption by the market of the possession and control of the animals which their owner brought to the market. The responsibility for injuries inflicted by animals depends on their possession and control. It is sometimes stated rather loosely that the owner is responsible for the animals, but that is only prima facie true, because he has generally the possession and control of the animals by himself or his servants or agents. Indeed, at least in the case of dangerous animals, a transfer of actual possession and control would not necessarily terminate his responsibility. The general test has been said to be who "keeps" or "harbours" the animals. In the present case I cannot understand how the mere fact of the respondents' erecting the pens and receiving the cattle in them would amount to an assumption by them of responsibility for the custody of the animals or make them keepers of them. The pens used for the steers were not merely not cattle-escape proof. They could not even be taken to be so by any farmer. He would naturally in his own interest continue by his men to watch and control his animals for all practical purposes as much as if they were being driven along the highway, though, no doubt, to some extent the pens would facilitate control. This is even more obvious in the case of the pens which had no chains at all in front, but that is only a matter of degree. In fact, the man and the boy who had driven the steers from the farm to the market stood outside the front of the pens "minding" the cattle. It is said that, on the facts of the case, there was a joint responsibility for, and sharing of, the custody of the cattle accepted by the respondents as market owners and attaching also to the farmer, but, for the reasons I have given, I do not think that the respondents ever assumed responsibility for these cattle, which still remained in the possession and control of the farmer. In short, if the respondents are at common law under no obligation to provide pens at all, they cannot be held responsible for not exercising due care to provide reasonably safe pens and never assumed or could have been taken to have assumed to do so.

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(1) 10 C. B. (N. S.) 123.

Reference was made in the evidence to the practice now frequently adopted by farmers of sending their cattle to market by cattle lorries instead of driving them by the roads. If in the course of this practice cattle are sent with no one to look after them at the market, other questions may arise as to the responsibility of the market owner. I merely notice the point without further discussing it.

It was, however, contended that the common law which I have been examining has been changed by various statutory provisions, beginning with the Markets and Fairs (Weighing of Cattle) Act, 1887. This Act and later amending Acts require every market authority which takes tolls for cattle to provide and maintain sufficient and proper buildings or places for weighing cattle and weighing machines. These Acts, it was admitted, applied to the Spalding Market. The cattle subsidy was introduced by the Cattle Industry (Emergency Provisions) Act, 1934, which was amended and extended by the Livestock Industry Act, 1937. Under these Acts and the Cattle Subsidy Scheme (Approval) Order, 1937, St. R. & O., 1937, No. 659, sch., para. 5, the respondents' market was approved as a certification centre, on the basis of their statement that they were equipped with sufficient and adequate penning and tying accommodation. It was contended that thereby they became under a new duty to provide reasonably sufficient pens to keep the cattle from escaping. It is true that when the respondents applied to the Cattle Committee for the approval of their market as a certification centre under the Act, they had to answer a question as to the number of fat cattle for which there was penning or tying accommodation in the market and answered "100 to 125," but I agree with the Lord Chancellor that these circumstances did not change the position between the respondents and members of the public or create any new duty to the public unknown to the common law. Indeed, I think that what was being considered was merely the convenient and orderly conduct of the market, to which its special use as a certification centre was an accessory or additional function of the respondents as market owners. I regard the word "accommodation" as used in this connection as directed only to matters of the capacity of the pens provided, not to their fitness to hinder cattle from straying. The word "accommodation" is regularly used in connection with markets in the sense of space or room, as in the answer of the judges in *In re Islington Market Bill* (1). Littledale J., who gave the answer on behalf of Parke B., Lord Commissioner Bosanquet and himself, said that they knew of no proceeding having been brought against the owner of a market for not providing proper accommodation. Such a breach of duty, he said, would be a misdemeanour as well as enabling an action at the suit of any private individual who received special injury thereby. If, before the Act of 1934, the market owner was under no duty of care adequately to fence, it cannot be supposed that the creation of a new duty of that nature involving both criminal and civil liability would be intended without clear and specific words. The verdict of the jury was based on the assumption that there was such a duty. Whether the duty exists or not is a matter of law, for the court and not for the jury. The jury were directed that there was such a duty. If there was no duty, as I have held there was not, the jury were misdirected and their verdict cannot stand, but must be set aside on grounds of law. A new trial would serve no useful purpose, and, accordingly, in my opinion, the proper course to adopt here is to enter judgment for the respondents in the action, in accordance with the rule approved by this House in *Mechanical and General Inventions Co., Ld.* v. *Austin* (1). I agree with the conclusion of the Court of Appeal, though not with all their reasons. I concur in the motion proposed.

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(1) (1835) 3 Cl. & F. 513, 519.

LORD PORTER. My Lords, the facts have already been fully stated and it is unnecessary that I should elaborate them, but there are one or two matters to which, I think, I must refer to make my views plain. In the first place Spalding Market is a certification centre. Before it was so recognized the Cattle Committee had to be satisfied that the premises were equipped with adequate penning or tying-up accommodation for cattle. Indeed it is a pre-condition of recognition under the Act that the Cattle Committee should be satisfied of this fact. This circumstance, however, was not relied on either in the appellant's pleading or in her case before your Lordships' House and was not pressed in the argument. Rightly so, I think, since neither the satisfaction of the committee nor the recognition of the market imposed any duty on the market authority in reference to the public or even to those who brought their cattle to be graded. There was no warranty or representation to the cattle owner that pens or tying up places would be provided for his cattle if he sent them, or that, if provided, they would be reasonably safe to retain cattle. Nor as a result of the Act and regulations made under it did that authority owe any duty to him to provide such pens. If no duty was imposed by the Act and regulations vis-a-vis the owner, it is difficult to see how such a duty could be imposed in reference to the public. As, in my view, the Act and regulations do not impose any fresh obligations, the respondents, if they are to be liable at all, must be liable for

(1) [1935] A. C. 346.

the breach of some common law duty. There is, however, no question here of a duty towards an invitee. Had the beast which killed Brackenborough itself been injured, some such question would have arisen and—*pace* Mr. Bates who repeatedly asserted that the pens, though they looked safe, were in fact unsafe—would have been answered by the obvious retort that a sagging chain was patently incapable of retaining a two-year-old steer. Indeed, Mr. Pentelow, the one-armed farm-hand, who drove the beast to the market had no doubts on the matter. I quote from his evidence. "(Q.) Did you "realize that these pens are not for cattle which are unattended, "but are attended? (A.) Yes, but I knew that when you do "attend to them if a bullock gets his head in the chains they "go up and down. (Q.) In fact, you and Walton remained "at that pen to see that the cattle did not get out? (A.) Yes "until that one went." And again "(Q.) You knew that any "one of these steers could have jumped over the sagging chain "in the middle did not you? (A.) Yes. (Q.) And could have "got under the chain where it was at its highest? (A.) Yes." Nor do I think Mr. Bates meant to assert that the sagging chain looked as if it would retain the cattle but was really incapable of doing so. He intended, I think, to convey only that the double chains at the back and sides or even the posts and rails looked, but were not, satisfactory. Otherwise, he would not have asserted that every pen in the market was unsafe. Obviously, the pens which had only three sides were incapable of retaining beasts unless the fourth side was adequately guarded, and a sagging chain was of little more use than an open end. This, at any rate, was the view of Mr. Pentelow who was asked what he meant by saying the pens were a bit tricky and replied: "The chains look tight when you stand and "look at them, and if the bullock got where there are two "chains they would lift up and down so that the bullock would "be able to get out." Even, however, if the double chain was deceptive and even if a member of the public were, like the owner of the beast, entitled to complain of a concealed danger, the deception was not in that part of the pen from which the beast escaped. The sagging chain was obviously incapable of retaining it and the concealed danger, if there was one, in the other part of the pen was immaterial because the escape was not effected through it. In these circumstances I do not stay to consider whether the evidence establishes that Brackenborough himself knew of the inability of the pens to prevent cattle from escaping. I treat him as any other member of the public, entitled to no less and no more protection. And, indeed, this is how the appellant asked that he should be regarded.

The appellant's case was stated to be that those who for profit provide appliances such as pens in a cattle market in which cattle attending that market are penned, are liable to any member of the public injured by reason of an animal escaping therefrom in consequence of the unsafe condition of the pens. They had, it was said, a duty to control the animals in some way, or, at any rate, if they provided pens, they must provide safe ones. The argument is not, I think, very precise. It leaves open the question what, if any, appliances the owner of a market is under a duty to provide? What, if any, measure of control must be undertaken and what are safe pens? Historically, I can find no warrant for the suggestion that the owner of a market is under a duty to provide pens or, indeed, any amenities except space to hold the market within the allotted boundaries and free ingress to and egress from the market itself for buyers and sellers with their wares. The owner may, indeed, provide pens and charge stallage on them, but I know of no authority which obliges the pens to afford any particular degree of safety, and, though the market owner may sometimes do as was done in this case, erect pens by inserting the uprights into slots provided to hold them, in many cases he could not do so even if he wished, e.g., in cases where the soil was not his and he had no right of picage by which is meant the right of interfering with the soil on which the market is held. As early as 1597 in *Heddy* v. *Welhouse* (1), stallage and picage are mentioned in contradistinction to the right of toll and no hint is given to suggest any obligation on the owner of the franchise to provide stallage or pens as incident to the holding of the market. In *Draper* v. *Sperring* (2) the owner of a market placed hurdles in the public street to pen sheep on market days for which she received tolls. The actual question for decision was whether the droppings of the sheep so penned created a nuisance, but Willes J. in the course of his judgment said (3): "It is clear that the proprietor of "the market was under no legal obligation to provide such "accommodation as this." A year later, in 1862, in *Great*

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(1) Moore Q. B. 474.
(2) 10 C. B. (N. S.) 113.
(3) 10 C. B. (N. S.) 123.

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Lord Porter.

Yarmouth Corporation v. *Groom* (1), Martin B. said: "If, "indeed, a person carried commodities in a basket to the "market for sale, merely using the basket to exhibit the "commodities to customers, and making no other use of the "ground, except when tired to place the basket upon it, "intending when rested to go to another part of the market, "such an use of the ground would not be stallage. It would "be nothing more than using the market for hawking, and it "might as well be said that cattle in a market, which it is "impossible to keep stationary, have an exclusive occupation "of one spot of ground . . . ." At that date obviously unpenned cattle were a commonplace in a market and even ten years later in 1872 in *Swindon Central Market Co., Ld.* v. *Panting* (2) an example is to be found of a market which was held in a public street. Yet neither pen nor stall was provided. Nor is it true to say that the holder of a market is in all cases entitled to charge tolls. Tolls are no necessary incident to a market franchise: see *Northampton Corporation* v. *Ward* (3) and *Duke of Newcastle* v. *Worksop Urban District Council* (4). A market is, as Chatterton V.-C. said in *Marquis of Downshire* v. *O'Brien* (5), "the franchise right "of having a concourse of buyers and sellers." At common law, therefore, the only duty cast on the owner of a market is to provide the requisite space and permit those who desire to attend and bring with them such things as are commonly sold there. I can see no more reason for supposing that he undertakes the care of animals sent there than for supposing that he undertakes the care of any other thing brought for sale. Moreover, I see less ground for assuming that the market owner should keep under control beasts brought to the market than for making this assumption as of general application in the case of a landowner whose land abuts on a highway, and as yet there is no authority justifying the general imposition of such an obligation: see *Jones* v. *Lee* (6), *Ellis* v. *Banyard* (7) and *Heath's Garage, Ld.* v. *Hodges* (8). As was said by Blackburn J. in *Fletcher* v. *Rylands* (9) in a judgment afterwards approved in *Rylands* v. *Fletcher* (10), "Traffic on the highways, whether by land or sea, cannot be

(1) 1 H. & C. 102, 111.
(2) 27 L. T. 578.
(3) (1745) 1 Wils. 107.
(4) [1902] 2 Ch. 145, 152.
(5) (1887) 19 L. R. Ir. 380, 390.
(6) (1911) 106 L. T. 123.
(7) (1911) 106 L. T. 51.
(8) [1916] 2 K. B. 370.
(9) (1866) L.R. 1 Ex. 265, 286.
(10) (1868) L. R. 3 H. L. 330.

"conducted without exposing those whose persons or property "are near it to some inevitable risk; and that being so, "those who go on the highway . . . . may well be held to "do so subject to their taking upon themselves the risk of "injury from that inevitable danger." So, too, I think persons going to a market or its vicinity must take the ordinary risks of escaping beasts.

Nor do I think that the appellant's case is assisted by the argument that, if the respondents provided pens, they must provide safe ones. How this would impose a duty towards the public I find it difficult to see, unless it could be said that the owner of the cattle who would normally keep them under his own control had been deceived to his own prejudice and the danger of the public, into leaving them unguarded and so letting them escape. But in any case what is meant by safe pens? "A pen," said the learned judge, "fit for the "purpose for which it is required." But what was that purpose? If there was no obligation to provide pens at all, and if those in charge of the animals could plainly see how much or how little assistance they could gain in controlling their beasts from the pens actually provided, then, however primitive or inadequate those pens were, they were at least better than nothing and to that extent furnished protection for the owner and the public beyond what they had the right to require. The market owner must, indeed, avoid erecting something in itself an object of danger to beasts brought into the market: see *Lax* v. *Darlington Corporation* (1), but as your Lordships decided in *East Suffolk Rivers Catchment Board* v. *Kent* (2), where no duty is imposed, a defendant who takes inadequate steps to attain a particular result which he is authorized but under no legal obligation to bring about incurs no legal liability if those steps do not effect the desired result, provided they do not increase the danger. The plaintiff is no worse off by reason of the steps taken and, unless he is, the defendant has incurred no liability. Lord Ashmore in *Fraser* v. *Pate* (3), quoted Lord Dunedin's words in *Clelland* v. *Robb* (4): "Negligence per se will "not make liability unless there is first of all a duty "which there has been failure to perform through that "neglect." *Fraser* v. *Pate* (3) was an action against a landowner for allowing his sheep to stray on the highway whereby

(1) 5 Ex. D. 28.
(2) [1941] A. C. 74.
(3) 1923 S. C. 748, 750.
(4) 1911 S. C. 253, 256.

a motorist using it with due care was injured. Lord Ashmore continued: "Pursuer's counsel were unable to cite any "precedent for the pursuer's claim, or any authority to the "effect, (*a*) that the defender was under a duty to the pursuer, "as a member of the public using the road, to keep his sheep "from straying on the road, or (*b*) that the accident and "consequent damage to the pursuer can be held to be the "natural or probable consequence of the presence of the "sheep upon the road." The first authority which Lord Ashmore declares to be wanting might, if it existed, have some bearing on, but would be far from decisive of, the question at issue in the present case. In its absence and in the absence of any other principle on which she can rely the appellant must fail. The second question was not argued in your Lordships' House, and, indeed, the appellant expressly declined to argue it. Its accuracy or applicability to the matter now under discussion is, therefore, not in question, and I leave it for further discussion when it is raised.

In coming to the conclusion which I have reached, I am expressing no opinion as to the liability or non-liability of the owner of the cattle. In his case it is possible that there would in general be no liability if the plaintiff had been injured by a beast which had escaped from his field on to the high road. Whether there would be a higher duty on an owner who brings beasts into a crowded market where the press of people and animals may terrify them to an extent to which beasts escaping on to the highway would not be exposed, need not be determined. In the present case the ability of the drovers to control the steer which escaped was increased, not lessened, by having a pen of the kind provided put at their disposal, and the respondents, who were under no duty to supply any pen, diminished rather than magnified the danger to the public from straying cattle by furnishing such an erection. Of that action the appellant cannot in law complain, nor do I think your Lordships can, in conformity with established principles, hold them liable on that or any of the grounds suggested. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Lee, Bolton & Lee, for E. W. Roythorne, Spalding.*

Solicitors for respondents: *J. D. Langton & Passmore, for Mellows & Sons, Peterborough.*

[HOUSE OF LORDS.]

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1941
Nov. 6, 7, 10, 13.
1942
Jan. 15.

LONDON PASSENGER TRANSPORT BOARD . . . . APPELLANTS ;

AND

MOSCROP . . . . RESPONDENT.

ET È CONTRA.

Trade union—Employee of public authority—Charge before superintendent and appeal from decision—Employees given right to be represented by union official—Employee not a member—Condition placing him under disability—Trade Disputes and Trade Unions Act, 1927 (17 & 18 *Geo.* 5, *c.* 22), *s.* 6, *sub-s.* 1.

Practice—Declaration—No interference with private right.

It was a term of the employment of the respondent, an omnibus driver in the service of the appellants, a public authority, that drivers appearing before a divisional superintendent hearing charges of alleged breaches of discipline or on appeal, might be accompanied by an official of a named transport trade union acting as advocate. In practice, officials of that union would accompany none but its members. The respondent was not a member of that union, but on an appeal by him from a decision of a divisional superintendent, he was accompanied by an official of a different trade union to which he belonged. The appellants, however, refused to allow that official to act as the respondent's advocate or to represent him in any way :—

Held, that the appellants had not imposed a condition on the respondent by which he was denied the advantage of representation on the hearing of an appeal by him so that he was placed or liable to be placed under a disability and disadvantage as compared with other servants of the appellants, and that, accordingly, they had not contravened the provisions of s. 6, sub-s. 1, of the Trade Disputes and Trade Unions Act, 1927.

As there had been no interference with any private right of the respondent, who had suffered no damage peculiar to himself by reason of the alleged breach of s. 6 of the Act, he was not entitled to a declaration that the condition was unlawful without joining the Attorney-General as a party. Furthermore, the declaration should not be granted to the respondent in an action in which the persons really interested, the named trade union, had not been joined as parties.

Decision of the Court of Appeal [1941] Ch. 91 reversed.

APPEAL from a decision of the Court of Appeal (1).

(1) [1941] Ch. 91.

*Present : VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, LORD PORTER.

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London Passenger Transport Board v. Moscrop.

The facts were stated by VISCOUNT MAUGHAM as follows: The respondent, who was at all material times a motor-omnibus driver, entered the employment of the London General Omnibus Company, Ld., on April 12, 1928. He joined the Transport and General Workers' Union (hereinafter called "the Transport Union") shortly after he entered the service of the omnibus company and he was still a member thereof during and after the settlement of a strike in 1937. During the years 1928 to 1937 inclusive the Transport Union was the only trade union which was concerned with the particular class of employees to which the respondent belonged. In 1933 the appellants, the London Passenger Transport Board, became his employers in succession to the omnibus company. One of the terms of employment in force between the respondent and his successive employers from April 12, 1928, up to April, 1937, was as follows: "Appeals in respect of any disciplinary action shall be heard weekly before a properly constituted disciplinary board. Drivers and conductors attending such appeals shall be allowed to appear in plain clothes and to be accompanied by a representative of the union." It was not disputed at the hearing that the respondent and his employers agreed to this term. "The union" referred to meant the Transport Union. The term was part of an agreement between the omnibus company and other companies, of the one part, and the Transport Union, on behalf of the motor omnibus drivers and conductors, of the other part, dated September 23, 1932. After the strike in 1937 the terms of the respondent's employment were embodied in an agreement, being part of the terms of settlement of the strike, dated June 15, 1937, and made between the appellants and the Transport Union. A book called the Brown Book was expressed to be a memorandum setting out the agreed rates of pay and the conditions of service of the appellants' drivers and conductors, and it contained in cl. 3 of the schedule to the agreement the following provisions: "Appeals. Appeals against depot superintendents' decisions shall be heard by the divisional superintendent concerned. Divisional superintendents may also hear charges in the first instance, according to the gravity of the charge. Appeals against the decisions of the divisional superintendents shall be heard weekly before a properly constituted disciplinary board. Drivers and conductors appearing before a divisional superintendent or on appeal may be accompanied by an official of the union." The union referred to in the clause was the Transport Union, and it purported to act on behalf of all the drivers and conductors of motor omnibuses employed in the Central London area. It was common ground that the privilege of being "accompanied" by an official of the Transport Union was understood to mean that the official had the right to speak as an advocate on behalf of the driver or conductor. Further, it was common ground that the Transport Union would not in practice allow an official of theirs to appear for any man who was not a member of that union or whose contributions were more than six weeks in arrear. It followed that the employees in question were only entitled as of right to assistance in stating their cases before the divisional superintendent or on appeal if they were members of the Transport Union and had paid their contributions up to a recent date, and it appeared that the appellants had adhered strictly to this rule. At the date of the agreement of June 15, 1937, the Transport Union was the only trade union representing the drivers and conductors concerned, but some of the drivers and conductors did not belong to that or any other trade union. Therefore, employees who were not members of the Transport Union were in fact placed under a disadvantage as compared with employees who were members of that union. The respondent himself was then under no disadvantage, but some time after the date of the agreement of June 15, 1937, he ceased to pay his contributions to the Transport Union and by reason of such cesser he ceased to be a member in or before December, 1937. In February, 1938, he joined the National Passenger Workers' Union ("the National Union") which had then recently been formed. These facts did not come to the knowledge of the appellants until April 18, 1939.

In February, 1939, a question arose whether the respondent had been guilty of some breach of duty. The matter came before the depot superintendent and the respondent was cautioned. He appealed to the divisional superintendent who affirmed the decision of the depot superintendent and therefrom the respondent appealed to the disciplinary board. The hearing of this appeal was fixed for April 18, 1939, and the respondent presented himself on that day accompanied by the general secretary of the National Union who was prepared to present the respondent's case and to represent him before the disciplinary board. The appellants, however, refused to allow him to represent the respondent before the disciplinary board, and in consequence the respondent declined to proceed with his appeal. It was stated at the trial by Mr. T. E. Thomas, a witness on behalf of the appellants, that the presence of representatives of trade unions in unfriendly rivalry was a source of disturbance to the conduct of the appellants' business. The respondent did not ask to be allowed to be represented by a solicitor or by some other friend, and it was only a matter of conjecture that such a request would in the circumstances have been refused.

On May 18, 1939, the present action was commenced by the respondent with the support of the National Union. The statement of claim did not set out a breach of s. 6 of the Trade Disputes and Trade Unions Act, 1927, by alleging that at a certain date the appellants had imposed a condition on persons employed by them whereby employees not members of the Transport Union were placed at a disadvantage with those who were. The fact that the respondent had been refused the assistance of the secretary of the National Union was set out, and it was then alleged that "by reason of the matters aforesaid "the plaintiff has, contrary to the provisions of s. 6, sub-s. 1, "of the Trade Disputes and Trade Unions Act, 1927, been "placed and is liable to be placed under a disability and dis-"advantage as compared with other servants of the defendants." The respondent, without any further statement of his cause of action, claimed: "(1.) a declaration that the condition of "the plaintiff's employment with the defendants whereby "the plaintiff is denied as an appellant before the defendants' "disciplinary board the advantage of representation by an "official of his own trade union while such advantage is granted "to or is the right of other servants of the defendants who "are members of another and their own trade union is un-"lawful; (2.) an injunction to restrain the defendants their "servants or agents from enforcing such condition as afore-"said; and (3.) such further or other relief as to the court "may seem just."

Morton J. held (1) that the appellants had not imposed on the respondent the condition complained of, and that, accordingly, they had not contravened the provisions of s. 6 of the Trade Disputes and Trade Unions Act, 1927. The Court of Appeal reversed this decision. The appellants appealed.

Comyns Carr K.C. and *H. E. Salt* for the appellants. What is dealt with by s. 6 is a preference being given as between

(1) [1940] Ch. 755.

unionists and non-unionists, and, as the respondent is in fact a member of a trade union, its provisions do not apply. In any event, no condition has been imposed on him within the meaning of the section, and, accordingly, there has been no contravention of it. Apart from special contract the appellants were not obliged to admit any third parties to investigations of breaches of discipline by their employees. The absence of right in the respondent to be represented is due not to any condition imposed on him, but to the absence in law of any such right.

Spens K.C. and *R. Moelwyn Hughes* for the respondent. By cl. 3 of the agreement of June 15, 1937, the appellants unlawfully imposed a condition on the respondent within the meaning of s. 6 of the Act, and that term was, accordingly, void. If the appellants wished to be consistent, they would not allow representation to any of their employees. The respondent only seeks equality as compared with members of the Transport Union. The respondent has been put at a disadvantage by the imposition of this condition in being deprived of representation by an official of his union. The court cannot take into consideration the question whether by his own volition he has lost the advantage of being a member of the Transport Union.

The House took time for consideration.

1942. Jan. 15. Viscount Maugham. My Lords, this appeal involves the true construction of a somewhat obscure section of the Trade Disputes and Trade Unions Act, 1927 (which I shall call "the Act"). It is s. 6, and it contains provisions as to persons employed by local and other public authorities. The appellants, who are in the latter category, have been held under a somewhat curious chain of circumstances to have committed a breach of the provisions of sub-s. 1 of that section, and it will be convenient to state its terms so far as relevant at once. They are, "It shall not be "lawful for any local or other public authority to make it a "condition of the employment or continuance in employment "of any person that he shall or shall not be a member of a "trade union, or to impose any condition upon persons "employed by the authority whereby employees who are "or who are not members of a trade union are liable to be "placed in any respect either directly or indirectly under any "disability or disadvantage as compared with other employees." By sub-s. 2: "It shall not be lawful for any local or other "public authority to make it a condition of any contract "made or proposed to be made with the authority, or of the "consideration or acceptance of any tender in connection with "such a contract, that any person to be employed by any "party to the contract shall or shall not be a member of a "trade union." By sub-s. 3: "Any condition imposed in "contravention of this section shall be void."

[His Lordship stated the facts, and continued:] Morton J. found that no condition, express or implied, was ever imposed to the effect that men could not be accompanied by anyone other than an official of the Transport Union. In order fully to explain his view, I cannot do better than cite his words on this point (1): "All that the board has done in the present "case is to contract with all members of its platform staff "that they may be accompanied by an official of the Transport "Union at the hearing of an appeal. That was a privilege, and "I do not doubt that it was a valued privilege. At the time "it was granted, and right on until February, 1938, according "to the evidence, the Transport Union was the only trade "union to which members of the platform staff belonged. "Apparently they did not all belong to it, but the board was "in no way concerned as to whether any particular man "belonged to it or not. The board said, in effect, to all "members of its platform staff: 'So far as we are concerned, "'you can be accompanied by an official of the Transport "'Union.' It is true that the officials of the Transport "Union would not appear for a non-member or for a member "who was not 'in benefit,' that is, whose contributions were "more than six weeks in arrear. That, however, was a matter "between the Transport Union and the men. It rested "entirely within the volition of each individual man whether "he did or did not belong to the Transport Union or keep up "his contributions. It may be said that by specifying that "men could be accompanied by officials of the Transport "Union the board impliedly stated that men could not be "accompanied by anyone else. Assuming that to be true, "in my judgment it is a misuse of language to describe this as "imposing a condition." There was, however, another point: When was such a condition as that claimed by the respondent ever *imposed* by the appellants? The answer, thought the

(1) [1940] Ch. 755, 760.

learned judge, was "never." "It was," he said, "the plaintiff "who brought about a state of affairs in which the Transport "Union would not allow any of its officials to accompany "him" (1). He, accordingly, dismissed the action with costs.

An appeal was heard before the Court of Appeal (Scott, Clauson and Luxmoore L.JJ.), and a somewhat unusual course was taken in that court. All the lords justices thought that the declaration and injunction claimed before Morton J. were sought to establish the right of the respondent to appear on the specified appeals by an official of the National Union and that this contention was based on the hypothesis of an implied clause whereby the respondent was denied the advantage of representation by an official of his union, a condition rendered void by the Act. In the joint judgment of Clauson and Luxmoore L.JJ., it is stated (2) that the respondent "claimed in effect that a condition entitling him to be represented by an official of his own trade union on disciplinary "appeals should be read into his own contract of employment "in order to render valid the condition in favour of a member "of the Transport Union in benefit conferred by cl. 3 of the "schedule to the agreement of June 15, 1937." They continued with these sentences: "The learned judge asked "himself the question when was such a condition as that "claimed by the plaintiff imposed and came to the conclusion "that the answer was 'never.' We respectfully agree with "that conclusion." The court then pointed out that not only was such a condition never imposed by the appellants, but that, if it had been imposed, it would be contrary to the provisions of s. 6, since employees who were not members of any trade union would suffer a disadvantage as compared with those who were, and it would, therefore, be void under sub-s. 3. It followed that the order of Morton J. was quite correct. It seems, however, that counsel for the respondent asked leave to amend the form of the declaration and there was considerable argument as to the form it should take. The new declaration, that is, the one which was ultimately made by the Court of Appeal, was in these terms: "This "court doth declare that the condition in regard to representation by an official of the Transport and General Workers' "Union imposed as part of the terms of employment of "employees of the defendant board by the provisions of cl. 3 "in the schedule to the memorandum of agreement of June 15,

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(1) [1940] Ch. 755, 761.

(2) [1941] Ch. 91, 107.

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"1937, in the pleadings mentioned implies upon its true "construction that no employee unless he be a member "of the Transport Union shall be entitled to be represented "on the hearing of an appeal by any person and that "the said condition is accordingly void by virtue of s. 6 "of the Trade Disputes and Trade Unions Act, 1927: And "the plaintiff is to be at liberty to apply for an injunc-"tion." I should say here that I do not understand what injunction could properly have been obtained following on this declaration, for I do not think the court would grant so useless an injunction as that the appellants were not to allow the representation to members of the Transport Union except as a matter of discretion. The result, if this order stands, is that the respondent instead of obtaining by his action a right of representation for himself on the specified appeals has succeeded only in depriving employees who are members of the Transport Union of any such right of representation. It should be added that Scott L.J. agreed with the form of declaration suggested by his colleagues, but he went further and said (1) that on the admitted facts "the board was guilty "of the forbidden act of 'imposing a condition which put "'him [the respondent] at a disadvantage, etc.'" and that this condition was void. As I read his judgment he would have been prepared to decide that the result followed that the respondent was himself entitled to be represented on the specified appeals.

My Lords, it appears from the statement of Mr. Spens, the leading counsel for the respondent, which we of course unreservedly accept, that the Court of Appeal misunderstood his contention in so far as they thought that he was contending on behalf of his client for any right to attend the appeals in question with an official of his union or with any other person. Throughout, he says, he was contending only for equality for his client as compared with members of the Transport Union and was seeking to obtain it by a declaration that the term as to representation on the appeals was void. It is not surprising to me that the lords justices misunderstood the real nature of the respondent's claim, for the declaration claimed was that "the condition whereby *the plaintiff is denied* "*as an appellant* . . . . the advantage of representation, etc., "was unlawful." If there had been such a condition and it was null and void, the conclusion might have been that the

(1) [1941] Ch. 99.

respondent was entitled to be represented on the appeals, and the respondent, by para. 5 of his case before this House states: "It was contended by the plaintiff that the board "had unlawfully *imposed upon him* a condition within the "meaning of s. 6 and had thereby committed a breach or "breaches of the duty towards the plaintiff imposed on the "Transport Board by the section." This certainly looks as if it was still the basis of the respondent's case that the appellants had imposed a condition, express or implied, on the respondent denying his right to be represented on appeals. Your Lordships will have to consider whether this view is or is not correct.

My Lords, I think we must express our regret that the statement of claim was not amended when the liberal amendment of the declaration was permitted by the Court of Appeal. The respondent's real claim is now manifest. He is seeking no right for himself of any kind. He asks, or at least he now asks, merely to have a paragraph contained in cl. 3 of the schedule to the agreement of June 15, 1937, declared to be void. I will repeat the paragraph: "Drivers and conductors "appearing before a divisional superintendent or on appeal "may be accompanied by an official of the Union," meaning the Transport Union. Accepting this view of the action, three questions have been argued: First, have the appellants "imposed a condition upon" their employees whereby employees not members of the Transport Union are "liable "to be placed under any disability or disadvantage" in relation to representation on appeals "as compared with other "employees"? Secondly, does s. 6, sub-s. 1, on its true construction extend to cases of discrimination between competing trade unions, that is, do the words "a trade union" (in the second branch of the sub-section) include "a particular "trade union" so that a condition placing one trade union at a disadvantage as compared with another is prohibited? Or, does the sub-section prohibit only such a discrimination as between unionists and non-unionists? Thirdly, is the action in any view of the construction of s. 6 maintainable by the respondent, that is, could he bring it except in the name of the Attorney-General, or, alternatively, could he properly ask for the declaration he ultimately obtained except in a representative capacity and with the parties substantially interested as defendants? There was also a point raised before your Lordships, but not before the other courts, based on the joint effect of s. 5, sub-s. 4, and s. 73, sub-s. 3, of the London Passenger Transport Act, 1933, but with this point I shall not find it necessary to deal, and I will say no more about it.

My Lords, s. 6 of the Act of 1927 is by no means easy to construe. Some things are perhaps clear. The section deals only with local or other public authorities and prohibits them from doing certain things. There is no prohibition on any trade union. Sub-s. 1 is in two branches relating to different things. The first branch relates expressly to "a "condition of the employment or continuance in employment" of any person. The second, the material one here, relates only to the imposing of a condition on persons employed by the authority whereby employees who are or are not members of a trade union are liable to be placed in any respect either directly or indirectly under any disability or disadvantage as compared with other employees. No penalty is imposed, but the "condition in contravention" of the section is to be void (sub-s. 3). What is meant by the word "condition"? It is clear that it does not mean here a condition in law, i.e., a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until some event happens. In my opinion, "condition" in this case means "a term of the contract." Such a term, I think, might be express or implied, and the contract need not be in writing, though it is almost inevitable that a list of the terms of employment of a large number of persons employed by an authority would necessarily be in print or in writing, either in a book (as in the present case) or in some document which could be shown, or, at any rate, would be readily accessible, to the employees. On the other hand, it is impossible to disregard the fact that the prohibition in sub-s. 1 is directed to the authority and to no one else. It is they who may not "impose" a term on their employees. The latter or their trade union on their behalf, if strong enough, may impose conditions on the authority. It is, therefore, not legitimate to read the section as if it ran: "No "condition whereby employees of a local or other public "authority who are or are not members of a trade union are "liable, etc., shall be made a condition of the employment or "continuance in employment of any persons by the authority." The prohibition in the second branch of s. 6 is directed to conditions *imposed* by the authority on the employees, and

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these words prima facie point to a condition imposing a disadvantage on a class of employees. In a case where a statutory prohibition involving the possibility of a prosecution for misdemeanour has to be construed the words of prohibition must be strictly construed, that is, the meaning of the words cannot properly be extended beyond their natural significance unless it is clear from the context that the legislature intended them to be used in a wider sense. For example, the word "imposed" does not mean "imposed or assented to." If a trade union should compel a local or public authority to make it a condition that none but members of the trade union should be employed by the authority, it seems to me impossible to hold that there had been a breach of s. 6. On the other hand, an authority might I think "impose a "condition" at the suggestion of some employees or a trade union on their behalf. Difficult questions of fact may arise, but they are rendered inevitable by the words used in the section.

Is there reason to think that the appellants have in this case imposed on their employees a condition to the effect stated in my first question? The term which is said to be a breach of s. 6, sub-s. 1, is of a somewhat special character. The appellants are clearly entitled to exercise their free discretion as to the persons who shall be allowed to accompany and represent employees appealing against adverse decisions, except in so far as they may have bound themselves by contract to permit or to refuse such representation. No doubt, members of the Transport Union will be entitled as of right under the clause (if it is valid) to the privilege in question and other persons will not be so entitled, but there is nothing in the clause to take away any right or privilege from any of these other persons. It was strongly contended on behalf of the respondent that there was an implied condition that no employee unless he be a member of the Transport Union shall be entitled to be represented on the appeals in question by any person. This implication in fact forms part of the declaration made by the Court of Appeal. It will be remembered that the declaration originally claimed was founded on an implied condition whereby *the respondent* was denied the right of representation on the specified appeals, and this is now altered. In my opinion, it is incorrect to hold that either of these conditions can be implied from the clause as to appeals which I have more than once cited. The reason why the appellants were entitled to refuse to allow the respondent to be represented at the hearing of his appeal by the general secretary of his union was simply that, at common law, they had a discretion in the matter. With all respect to the Court of Appeal, cl. 3 of the schedule does not justify the implication in question because the suggested clause would leave the rights of persons not members of the Transport Union exactly where they were apart from the implication. It is well settled that no term, whether of the nature of a condition or not, can be implied in a contract except where it is necessary to give the transaction the efficacy that both parties must have intended it to have. So far from such an implication being necessary here, it would be entirely without effect.

In the absence of any such negative implied term, where is the condition imposed whereby the employees who are members of the National Union or non-unionists are placed directly or indirectly at some disability or disadvantage as compared with members of the Transport Union? My Lords, I have been unable to satisfy myself that any such condition or term can be found in this case. A privilege has been given to the members of the Transport Union which does not, in my opinion, involve the imposition of a condition which would be contrary to the prohibition in s. 6, sub-s. 1. To avoid misconception, I should say distinctly that I am not so deciding on the general ground that a benefit or advantage is being given to the members of the Transport Union, and that no such benefit or advantage is given to others and that it therefore follows that there is no condition within s. 6. If under a contract rights are conferred on one class of employees and lesser rights are conferred on another, it might well be possible to bring the case within s. 6. For example, if a fixed weekly wage were given to unionists and a smaller wage to non-unionists (or vice versa) it seems to me that a court might well infer from the comparison of the two clauses that there was in effect a condition imposing "directly "or indirectly" a disadvantage on one of the two classes. In the present case all the circumstances must be considered and, bearing in mind the fact that the respondent, and others in the same position, are themselves responsible for any disadvantage under which they lie, and the difficulty of finding as a matter of construction that there is a condition imposed which creates any disadvantage, I cannot see any sufficient ground for concluding that there has been a breach by the appellants of the provisions of s. 6, sub-s. 1.

As I have reached this result on the first point, it is not necessary to decide the second question, which, in my opinion, is one of very great difficulty on which different minds may well reach different conclusions. I will only say that I am not at present convinced that the second branch of s. 6, sub-s. 1, is limited only to attempted discrimination between unionists and non-unionists. On the other hand, I think it right to deal with the third point, which raises questions of general importance, since, as Viscount Finlay observed on a similar question, "it concerns . . . . the proper administration of "justice," and is, therefore, one on which this House should express its opinion "whether the suit was rightly brought and "should be entertained": *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (1).

My Lords, I cannot call to mind any action for a declaration in which (as in this case) the plaintiff claims no right for himself, but seeks to deprive others of a right which does not interfere with his liberty or his private rights. Still less can I think that there is any precedent for such an action in the absence of the persons who are interested in opposing the declaration. It has been stated again and again, and also in this House, that the jurisdiction to give a declaratory judgment should be exercised "with great care and jealousy": *Austen* v. *Collins* (2), and "with extreme caution": *Faber* v. *Gosworth Urban District Council* (3), and see *In re Clay* (4), and *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (5). We must first test this matter irrespective of s. 6 of the Act which imposes a statutory prohibition but does not purport to confer a right. Suppose a person in a particular parish were to bring an action for a declaration that persons residing in an adjoining parish were not entitled to a right of way over a neighbouring forest, and suppose that his counsel had to admit that he (the client) had no such right of way, but was prejudiced or affected because persons in his parish were being tempted to move to the adjoining parish to get the benefit of the right of way, can anyone doubt that the action would be properly dismissed? That seems to be clear. Then what difference does s. 6 make to the present respondent? Assume for this purpose that there has been a breach of the prohibition contained in the section and that cl. 3 in the schedule to the Brown Book as regards representation is, therefore, void, and that no employees have any contractual right of representation on the appeals. What special interest has the respondent to enable him to bring this action ? We are not here concerned with anything but his civil right, if any, under the section. I think it plain that there has been no interference with any private right of his, nor has he suffered special damage peculiar to himself from the alleged breach of the general prohibition as to certain acts directed to local or public authorities contained in s. 6 : see *Boyce* v. *Paddington Borough Council* (1), and cases there cited. He, therefore, could not sue without joining the Attorney-General.

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(1) [1921] 2 A. C. 438, 445.
(2) (1886) 54 L. T. 903, 905.
(3) (1903) 88 L. T. 549, 550.
(4) [1919] 1 Ch. 66.
(5) [1921] 2 A. C. 438, 445, 453, 461.

I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made. In the Chancery Division, in which this case started, the rule would seem to be almost invariable, and the well-established practice in actions by shareholders and debenture holders may be mentioned as instances of the rule. With the greatest respect for the Court of Appeal, I think that the amended declaration pronounced by that court, even if the section were applicable, ought not to have been made.

On the above grounds I am of opinion that the order of Morton J. was right, and that the order of the Court of Appeal should be reversed with the usual consequences as to costs. The cross-appeal necessarily fails and should be dismissed with costs. I move your Lordships accordingly.

Lord Russell of Killowen (read by Lord Porter),

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(1) [1903] 1 Ch. 109, 114.

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My Lords, I am of opinion that the respondent has no cause of action, and that the judgment of Morton J. dismissing his action should be restored.

According to the natural reading of s. 6 of the Trade Disputes and Trade Unions Act, 1927, that section appears to me to be dealing only with questions of unionism and non-unionism, and I see no reason in the case of a penal enactment for stretching its language to include questions as to membership of particular unions. As I read the section, it makes provision to the following effect: the first branch of the first sub-section makes it unlawful for a public authority to require an employee to be a unionist or a non-unionist; the second branch makes it unlawful for a public authority to impose a condition on an employee whereby, if he is a unionist he is placed under a disability or disadvantage as compared with a non-unionist, or, if he is a non-unionist, he is placed under a disability or disadvantage as compared with a unionist; the second sub-section makes it unlawful for a public authority to require a contractor who enters into a contract with the authority to employ unionists or non-unionists. By the third sub-section any condition imposed in contravention of the section is avoided. If I am right in this view of the section's meaning, this case is outside it. Whatever be the effect of the clause contained in the fifth paragraph of cl. 3 in the schedule to the Brown Book (which I call for brevity "the representation clause"), or of any provision properly implied from it, the respondent, being himself in fact a unionist, cannot complain or pray the section in aid.

If, however, I am wrong in my construction of the section, the respondent must still, in my opinion, fail. No condition has been imposed on the respondent. No condition has been imposed on him expressly, and I see no justification, by necessity or otherwise, for reading into the respondent's contract of service the implied clause which has found favour with the Court of Appeal. The representation clause is a modification, in favour of employees, of the appellants' common law right to refuse representation. There is no provision express or implied prohibiting the respondent from being represented on any appeal by an official of his own union or by another person. The result is that if the respondent wishes to be represented on an appeal his representative must be someone whom the appellants are willing to admit to their investigations. I am unable to construe the clause in question as the imposition of a condition within the section.

A further point remains for consideration. The respondent's statement of claim is, as I read it, based on the view that the appellants' conduct on April 18, 1939, constituted the imposition of a condition within the section, and Scott L.J. was of opinion that s. 6 was not limited to conditions in a contract, but that a course of conduct or practice of the appellants, in only allowing men to be represented on appeals by an official of the Transport Union, would constitute the imposition of a condition within the meaning of the second head of sub-s. 1. Clauson and Luxmoore L.JJ., however, based their judgments only on the view that the appellants' contract with the respondent involved as a term thereof a provision (implied from the express representation clause) that unless he was a member of the Transport Union he was not to be entitled to be represented on appeal by anyone. I have already stated my difficulty in justifying this implication, but, with it as the basis of their order, the Court of Appeal made a declaration that the representation clause was void. This appears to me to have been a complete re-casting of the respondent's alleged cause of action, and the matter was unfortunately carried through without any amendment of the statement of claim. This should not be so. Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be "deemed to be amended" or "treated "as amended." They should be amended in fact.

For myself I do not agree with Scott L.J. In my view, a condition, to be within the section, must be a contractual condition. The section provides for its being "void." The condition must, therefore, be capable of "avoidance." To say that a person's conduct, or act, or practice, or attitude is "void," is meaningless and of no effect. The only way, as it seems to me, to give effect to sub-s. 3 of s. 6, is to read the word "condition" in the section as meaning contractual condition.

What then is the effect of the declaration made by the Court of Appeal? It "avoids" the representation clause. In other words, that clause is struck out of the Brown Book with the result that the appellants, on the hearing of appeals, are left to the exercise of their common law rights of allowing or refusing to allow an appellant, as and when he presents himself at the hearing of any appeal, to be accompanied or represented by a representative as the appellants in the exercise of their discretion think fit on the particular occasion and in the particular case. An appellant could not complain if he were refused representation, nor would he have any remedy under s. 6, by injunction or otherwise. The result of this litigation, if this appeal failed, would be that the respondent, who set out to get something for himself, had only succeeded in taking something away from his mates. But, in my opinion, the appeal should succeed, and the respondent's action should be dismissed. The cross-appeal fails and should be dismissed.

Lord Macmillan (read by Lord Wright). My Lords, the respondent's statement of claim as it still stands on record unamended asks for something very different from what he has been given in the Court of Appeal. What he finally decided to ask from this House differs from both of these formulas. There were also other incidental attempts to frame an appropriate declaration. The uncertainty thus manifested as to what the respondent really conceived to be his rights has embarrassed the presentation of his case throughout. This is in no way the fault of the experienced counsel who appeared for him, but is, in my opinion, simply due to the fact that the statute which the respondent invokes does not fit his case and that no amount of contrivance will make it do so.

The respondent's real grievance is that he has not a right to insist on a representative of his trade union being allowed to accompany him when attending the hearing of an appeal before his employers' disciplinary board, whereas members of another and rival trade union are entitled to such assistance. For this grievance the Trade Disputes and Trade Unions Act, 1927, does not, in my opinion, provide the respondent with a remedy. The Act in its title professes (inter alia) to regulate the position of "persons employed by public authorities in "respect of membership of trade unions," and in s. 6 enacts certain measures designed, as I read them, to prevent local or other public authorities from discriminating between unionists and non-unionists in the matter of the terms of their employment. Now it may well be that the provision dealing with representation on appeals contained in the agreement between the plaintiff's employers and the Transport

Union places employees who are not members of a trade union under a disadvantage as compared with those who are members of a trade union, but the respondent is not entitled to complain of this. He is not a non-unionist complaining of a disability imposed on him as such in comparison with unionists. His complaint is that a privilege conferred on the members of a particular trade union is not available to him as a member of another trade union. This is a complaint of discrimination among trade unionists, not of discrimination between unionists and non-unionists. In my opinion, the statute, which renders unlawful only certain specific acts on the part of public authorities, does not cover the respondent's case. I do not think that, in the case of a statute the contravention of which may involve penal consequences, it is permissible to extend its operation beyond what its terms precisely enact.

If further reasons were necessary for dismissing the action, they are not far to seek. It is only by the most forced reading of the section that a condition of employment can be said to have been imposed on the respondent when there was conferred on drivers and conductors permission to be accompanied by a representative of the Transport Union at the hearing of appeals. What has really happened is that the respondent has chosen, for reasons which no doubt seemed good to him, to render himself by his own action ineligible for a privilege conferred on employees to whom the assistance of a representative of the Transport Union is available. My noble and learned friends have other criticisms to make, the cogency of which I recognize, but I find it sufficient to say that, in my opinion, the action is misconceived and that the respondent is not entitled to obtain from your Lordships any one of the varied selection of declarations proffered. The appeal should, accordingly, be allowed, and the judgment of Morton J. dismissing the action should be restored. The cross-appeal should be dismissed.

Lord Wright. My Lords, I have had the advantage of reading in print the opinions which have been delivered by my noble and learned friends, Lord Maugham and Lord Russell of Killowen. I agree with them that the appeal should be allowed and that the action fails.

The main ground on which I reach this conclusion is that the facts show no condition of employment imposed on the respondent within the meaning of s. 6, sub-s. 1, of the Trade Disputes and Trade Unions Act, 1927. What is relied on as amounting to such a condition is said to be found in the following words contained in the agreement dated June 15, 1937, between the appellants and the Transport and General Workers' Union (conveniently called the "Transport Union") of which the respondent was then a member. The words are: "Drivers and conductors appearing before a divisional super-"intendent or on appeal may be accompanied by an official "of the union" (i.e., the Transport Union). This clearly means that the appellants will grant to every employee a right to be represented by the union official. It is agreed that the appellants were bound by the clause vis-a-vis each employee, including the respondent.

It cannot be contested that, apart from these words, the appellants had a right to allow or to refuse at their discretion to any employee representation on appeals. This discretion is pro tanto taken away by the clause to the extent of its express words, which limit the appellant's discretion and give a privilege to the employees which otherwise they would not have had, but I am unable to regard the grant of that privilege as a condition imposed on the parties employed within s. 6, sub-s. 1, of the Act. The privilege is given to all the employees without exception. The words used are simple and straightforward. There is no principle of construction known to me which would here justify extending or limiting their plain meaning. The difficulty which, it is said, has arisen does not spring from any construction of the words themselves but because of the circumstances external to the contract, which is that the Transport Union will not (unless they change their rules or practice, as they are free to do) allow its officials to accompany or represent on appeals employees who are not members of the union or of members who are in arrear in payment of their subscriptions. It is only that fact which prevents such employees from availing themselves of the particular privilege granted by the appellants. There is nothing in the contract itself which disables any employee from enjoying the privilege. Indeed, at the date of the contract the respondent was a member of the union. The Court of Appeal sought to avoid this difficulty by turning the clause round and making it imply "upon its true construction "that no employee unless he be a member of the Transport "Union shall be entitled to be represented on the hearing of "an appeal by any person." With the greatest respect to the Court of Appeal, it is, in my opinion, impossible to extract that meaning from the clause. All that the clause says is that an employee (whether unionist or non-unionist) is to be allowed (so far as the appellants are concerned) to be accompanied by a representative of the Transport Union. It has nothing to say as to representation by any other person. As to that the appellants' general discretion remains unaffected. I read the words "condition imposed, etc.," in an untechnical sense as meaning a term of the employment, but whatever meaning they may have in other connections I cannot regard them as including what is simply the grant of a privilege of which it is within the employees' option to avail themselves or not, as they like or are able.

In the result, the respondent fails to bring himself within the first words of the relevant limb of the section. It is, therefore, unnecessary to consider the precise terms of any of the differing declaratory judgments which have been claimed or propounded in the proceedings, whether before Morton J., or the Court of Appeal or this House. I must, however, associate myself with what has fallen from Lord Maugham and Lord Russell of Killowen by way of condemning the looseness of practice which allows substantial changes to be made in the relief claimed or cause of action without precise and formal amendment of the pleading.

It is unnecessary, in my opinion, in this appeal to decide whether the discrimination to prevent which the Act is directed is limited to discrimination between unionists and non-unionists or includes also discrimination between members of one union and members of another union. On that matter I adopt the same attitude as Lord Maugham.

On the questions of procedure I agree that no cause of action is shown. The respondent is not claiming any relief or advantage for himself, and the case is not one in which the court should exercise its discretionary power to make a declaratory judgment. I also agree that the action is not properly constituted in regard to parties. I do not desire to add anything on these matters to what Lord Maugham has said. I concur in the motion proposed.

LORD PORTER. My Lords, this case raises a short but difficult point as to the construction of s. 6 of the Trade Disputes and Trade Unions Act, 1927. The appellants are

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admittedly a public body, and, therefore, within the mischief of the section. That portion of the wording which applies to them and is material for the determination of the present case may be put in shortened form. "It shall not be lawful " . . . . to impose any condition upon employees whereby "those who are or are not members of a trade union are liable "to be placed in any respect either directly or indirectly under "any disability or disadvantage as compared with other "employees."

Two main contentions were put forward on behalf of the appellants: (I.) It was said that the section only dealt with disputes between unionists and non-unionists; that the respondent was a member of a trade union, albeit not one whose officials might represent him; and that, as the Act had no application to disputes between the members of one trade union and those of another, its provisions were not applicable; (2.) that in any case no such condition as that referred to in the section had been imposed.

In the view that I take it is not necessary to come to any final conclusion as to the first point, but as at present advised I am not prepared to accept the argument. Of course, if "members of a trade union" means "trade union members" the appellants are right. The section would then mean trade unionists and non-trade unionists must not be placed at a disadvantage one as compared with the other, but, to my mind, those words may be construed with at least equal plausibility as meaning members of a particular trade union shall not be placed at an advantage or disadvantage as compared with those who are not members of that trade union, whether they be members of another trade union or of none. Prima facie, the phrase "other employees" embraces all who are not included in the class composed of members of a trade union and there may be less difficulty in construing "a" as meaning "one" or a "particular" trade union than in imputing to it the meaning of "any."

Assuming this view to be correct, it has to be determined whether any condition has been imposed whereby the respondent has been subjected to a disability as compared with members of the Transport Union. In discussing the point I find it simpler to consider the contrast between unionist and non-unionist than between members of one trade union and members of another, not because of any difference in principle but because the distinction between the two former classes is more simply expressed in words than that between the two latter. Let me assume then that the respondent is a non-unionist, as indeed, he is if "union" means what in his contract it is defined to mean, i.e., the Transport Union. By the refusal to allow him to be represented by any one other than an official of the union the appellants were in fact preventing him from being represented at all, since it was well known that those officials would represent none but their own members and it became known, at any rate at the hearing, that the respondent was not a member of that union. He was, therefore, placed under a disability as compared with members of the union.

The difficulty does not lie in ascertaining whether the respondent has suffered a disability or not, but in determining whether a condition has been imposed. If all that phrase meant was that the contract between the party complaining and the authority must not contain any terms by reason of which a non-unionist is under a disadvantage as compared with a unionist I should have less difficulty in construing the phrase as the respondent suggests. It may be true to say that the contract with the non-unionist contains no term placing him under a disability. I discuss this question later, but the contract with unionists contains a term which puts them at an advantage as compared with the non-unionists, and, accordingly, places the non-unionist at a disadvantage as compared with the unionist. The section, as I understand it, presupposes a contract applicable to a class of persons which may be composed of unionists or non-unionists or both, and in such a contract advantage or disadvantage are relative terms. There is no datum line—the position of each party is relative to that of the other. If one has an advantage the other must have a relative disadvantage, with the result that the contract which is applicable to both contains a term which puts one under a disability as compared with the other. But is this "imposing a condition"?

It was argued on behalf of the appellants that the word "impose" connoted that the condition was unwillingly accepted by the employee and that anything to which he willingly agreed could not be said to be imposed. I doubt this. No one can compel the employee to accept an engagement, but if he does so his willingness is shown by entering into the agreement which he accepts. All that I think a tribunal can consider is whether, albeit on a balance of advantages and disadvantages, the employee in fact thought fit to accept the employment. If he does not wish to do so, he need not enter into the contract at all. But if he does I do not think he can be said to act willingly. Nor can I believe that, if a would-be driver in applying for employment says: "I am a unionist (or non-unionist "as the case may be) and I know you do not like such "persons, I also know you usually pay 5*l.* but I will take "4*l.*," the resultant term of the contract to pay 4*l.* is not imposed, whereas if the employer had expressed the same view the term would properly be said to be imposed. The object, as I see it, of using the word "imposed" is not to indicate willingness or unwillingness on the part of the employee, but to make it plain that the condition, if it is rightly to be described as "imposed," must be shown to be to his disadvantage. I do not think you *impose* an increase of salary or ameliorated conditions on an employee. You *grant* them.

If this be the true view, no condition contrary to the section has been imposed on the members of the Transport Union, because they have not been subjected to a disadvantage but have only received a benefit. Has, then, a condition been imposed on the respondent? The Court of Appeal found that it had. It was suggested that their method of approach was to construe the respondent's contract as containing an implied term that he would not as of right be entitled to be represented by anyone except one of the officials of the Transport Union and that that in effect meant no representation at all. I should have difficulty in accepting such an argument. I see no necessity for implying such a term to give efficacy to the contract, and, if a term is to be implied, this necessity must exist.

In your Lordships' House, counsel for the respondent maintained—as, indeed, I think they maintained in the court below—that on the true reading of the contract the term was there and did not need to be implied. The term suggested was that a non-unionist would not be allowed to be represented by anyone except an official of the Transport Union, and, therefore, in effect would be denied representation. As the Court of Appeal stated it (1): "the condition in regard to "representation by an official of the Transport Union imposed "as part of the terms of employment of employees of the

(1) [1941] Ch. 91, 107.

"Transport Board by the provisions of cl. 3 in the schedule to "the memorandum of agreement of June 15, 1937, implies upon "its true construction that no employee unless he be a member "of" that union "shall be entitled to be represented on the "hearing of an appeal by any person," and by "entitled" they meant "shall have the contractual right to be." I do not think that by this statement the Court of Appeal meant that a term ought to be implied. What they say is that the express term, when truly construed, connotes that no one other than a member of the Transport Union will be allowed representation as of right. If I thought that this was the true construction of the respondent's contract I should agree with the Court of Appeal, but I do not think it is. The provision as to representation of employees before the disciplinary board contained in the Brown Book concerns only members of the Transport Union and forms no part of the contract of service between the appellants and the respondent. Plainly not all the terms of that agreement are effective in the case of the respondent: e.g., he is a driver and terms which concern conductors are no part of his contract. So, likewise, he is a member of another union and terms which affect members of the Transport Union in no way concern him.

His contract of employment, then, is unembarrassed and unaided by the provisions of cl. 3 of the schedule—the representation clause—just as I think they are unaffected by cl. 5 of the schedule which deals with the recognition of the "Union." There is, it is true, an omission from his contract of a term which might have been imposed, but there is no imposition, and, indeed, no such term as is contended for. The employer is not imposing a term. He is omitting an advantage.

If, then, that part of cl. 3 which deals with representation forms no part of the respondent's contract, it cannot be or have been imposed on him, and there is no term of his employment which falls under the ban of s. 6 of the Act of 1927. This conclusion makes it unnecessary to pronounce on the further points taken on behalf of the appellants, and I must not be taken to assent to them.

There are, however, two observations which I should add: (1.) I do not agree with the suggestion of Scott L.J. that the appellants, by refusing to allow the respondent to be represented by the secretary of his trade union, imposed a condition

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whereby he was liable to be placed at a disadvantage as compared with others. The section is, I think, dealing with the terms of a man's employment, not with the decisions which the employer may take from time to time in individual cases. In coming to a decision to refuse representation he is merely relying on the general law that there is no obligation on an employer to let his employee be represented on a matter of discipline, and reliance on the general law is not, in my view, the imposition of a condition. (2.) I think, as indeed I believe all your Lordships think, that it is unfortunate that so great a change between the remedy asked and that given by the Court of Appeal should have been made without the appropriate amendment in the pleadings. These, however, are minor matters, and for the reasons which I have given I would allow the appeal.

Solicitors for appellants: *Solicitor to London Passenger Transport Board.*

Solicitors for respondent: *Cole & Matthews.*

F. C.

Heyman v. *Darwins, Ld.* [1942] A. C. 356
Applied. WOOLF *v.* COLLIS REMOVAL SERVICE - - [1948] 1 K. B. 11

Referred to. JUDSON *v.* ELLESMERE, ETC., CLUB. [1948] 2 K. B. 52

[HOUSE OF LORDS.]

H. L. (E.)*
1941
Oct. 28, 30, 31;
Nov. 4, 6.
1942
Feb. 20.

HEYMAN AND ANOTHER . . . . APPELLANTS;

AND

DARWINS, LIMITED . . . . RESPONDENTS.

Arbitration—Contract—Repudiation—Any dispute arising "in respect "of this agreement"—Scope of arbitration clause.

When an arbitration clause in a contract provides without any qualification that any difference or dispute which may arise "in "respect of" or "with regard to" or "under the contract" shall be referred to arbitration, and the parties are at one in asserting that they entered into a binding contract, the clause will apply even if the dispute involves an assertion by one party that circumstances have arisen, whether before or after the contract has been partly performed, which have the effect of discharging one or both parties from all subsequent liability under the contract, such as repudiation of the contract by one party accepted by the other, or frustration of the contract. *Secus*, generally, if the point

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* *Present:* VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD PORTER.

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in dispute is whether the contract containing the clause was ever entered into at all or was void ab initio, for example, because the making of it was illegal.

Observations of Lord Loreburn L.C. and Lord Shaw in *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.*, 1909 S. C. (H. L.) 53, at pp. 54, 56; and of Viscount Haldane L.C. in *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* [1915] A. C. 499, at p. 505, not adopted. Decision of the Judicial Committee of the Privy Council in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* [1926] A. C. 497, questioned.

An arbitration clause in a contract provided that "if any "dispute shall arise between the parties hereto in respect of this "agreement or any of the provisions herein contained or anything "arising hereout the same shall be referred for arbitration in "accordance with the provisions of the Arbitration Act, 1889." A dispute having arisen between the parties, the appellants commenced an action against the respondents claiming (*a*) a declaration that the respondents had "repudiated and/or evinced "an intention not to perform" the contract and (*b*) damages. The respondents, who admitted the existence of the contract and denied that they had repudiated it, applied to have the action stayed in order that it might be dealt with under the arbitration clause:—

Held, that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed.

APPEAL from the Court of Appeal.

The facts were stated by Viscount Simon L.C. as follows:

By a written contract dated February 19, 1938, the respondents, manufacturers of steel in Sheffield, as principals appointed the appellants, whose business address was in New York, to be sole selling agents of their tool steels in a wide area of territories including the western hemisphere (excluding U.S.A. and Argentine), Australia, New Zealand and India. The appellants were to sell in the name of the respondents, the respondents fixing f.o.b. prices and the appellants charging the purchaser with such excess price over f.o.b. prices as they could obtain. Any excess price over the f.o.b. price was for the credit of the appellants and the respondents were to account to the appellants in respect of such excess price after the respondents had received payment in full from the purchaser. The duration of the agreement was to be for three years from April 1, 1938, as a minimum. The agreement contained an arbitration clause in the following terms: "If any dispute shall arise between the parties hereto "in respect of this agreement or any of the provisions herein "contained or anything arising hereout the same shall be "referred for arbitration in accordance with the provisions of "the Arbitration Act, 1889, or any then subsisting statutory "modification thereof." Subsequently the respondents complained that the appellants were selling the respondents' steels for purposes for which the purchasers found they were not suitable, and that in consequence the respondents were faced with the risk of having to meet claims from dissatisfied buyers. Thus, the respondents wrote on July 18, 1939: "Under our "contract with you these claims are your responsibility and "we therefore cannot make any further remittances to you "until we are satisfied that no such claims will be made, or "alternatively that any that have been made have been "settled." The appellants, who first heard by cable from their representative in England of this attitude of the respondents, wrote on July 24 to protest: "I do not know "by what right you pretend to hold any of our money as "guarantee against possible claims." Each party maintained its position, the appellants reporting their success in obtaining further orders in Australasia, and the respondents writing on August 24: "We can only accept further orders on the strict "understanding that from the amounts due to you a certain "percentage must be retained to build up a reserve for the "reasons already stated." On September 8, the appellants replied that this seemed to them to be a breach of contract on the respondents' part and they refused to assent to any such stipulation. The anxiety of the respondents to get their profits promptly transferred from London to New York gained additional force by reason of the Treasury control established at the outbreak of the war. On November 7, the respondents wrote to express their dissatisfaction at the way in which the agreement was working out and added: "in the circumstances "we would either suggest cancelling this agreement altogether "or entering into negotiations with the view to drawing up "another arrangement which would have to be such that "satisfaction would be assured for all parties concerned." The appellants' solicitors wrote on December 21, referring to the letters of July 18, August 24, and November 7, and alleging that they showed that the respondents "have repudiated "and/or evinced an intention not to perform" the agreement (an allegation which the respondents denied), and a writ was issued in the King's Bench Division on January 27, 1940, asking the court to make a declaration that the respondents "have repudiated and/or evinced an intention not to perform" the agreement, and also claiming damages under various heads. The respondents applied for the action to be stayed under s. 4 of the Arbitration Act, 1889. Cassels J. in chambers held that the issue involved only a question of law and in the exercise of his discretion refused to grant a stay. The Court of Appeal allowed an appeal by the respondents, holding that the arbitration clause applied and that Cassels J. had wrongly exercised his discretion. The appellants appealed.

M. Turner-Samuels and *D. J. Turner-Samuels* for the appellants. Cassels J. in exercising his discretion in favour of the appellants followed no wrong principle and his discretion should not be interfered with. Further, the respondents in fact repudiated the contract by failing and refusing to perform it, as well as by the claim they made in a letter dated February 15, 1940, that by reason of the issue of the writ by the appellants and the claims made therein the appellants had repudiated the contract and the respondents accepted this repudiation. Accordingly, the whole contract is at an end and with it the arbitration clause, so that the dispute does not fall within it. The respondents. who have repudiated the contract, are prohibited, by the doctrine of approbation and reprobation, from relying on a clause which constituted one of its terms. [They referred to *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.* (1); *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* (2) and *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (3).]

Sellers K.C. and *Scott Cairns* (for *J. P. Ashworth*, on war service) for the respondents. The contract was never repudiated by the respondents, and, accordingly, the arbitration clause applies to this dispute. The rule in *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* (2) only applies in the case of a repudiation going to the root of the contract. No such repudiation was proved and there was no sufficient evidence of any acceptance by the appellants of the alleged repudiation. Further, Cassels J. exercised his discretion wrongly since no difficult questions of law are involved in the interpretation either of the agreement or of the correspondence. No sufficient grounds have been shown why the appellants should not proceed by way of arbitration in accordance with their agreement.

The House took time for consideration.

(1) 1909 S. C. (H. L.) 53, 56.
(2) [1915] A. C. 499.
(3) [1926] A. C. 497.

1942. Feb. 20. VISCOUNT SIMON L.C. (read by Lord Macmillan). The question to be decided in this appeal is whether an action started in the King's Bench Division of the High Court by the appellants against the respondents should, on the application of the latter, be stayed pursuant to s. 4 of the Arbitration Act, 1889, in order that the matters in dispute between the parties may be dealt with under the arbitration clause. The appellants contend that the dispute does not fall within the arbitration clause at all, and, alternatively, that, if it does, the judge in chambers, Cassels J., rightly exercised his discretion in refusing to stay the action. The Court of Appeal (Scott, MacKinnon and Luxmoore L.JJ.) took a contrary view and held that the arbitration clause clearly applied, and that the learned judge made a wrong use of his discretion in refusing the stay. The Court of Appeal refused leave to appeal further, considering that the case was "a very "simple one," but the appeal committee of the House, largely I think because of the uncertainty said to result from certain pronouncements in previous cases decided in the House of Lords and the Judicial Committee, gave leave.

The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (*a*) what is the dispute and (*b*) what disputes the arbitration clause covers. To take (*b*) first, the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties "in respect of " the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it. If the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have happened for example, whether the agreement has been broken by either of them, or as to the damage resulting from such breach, or whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance, or whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further—in all such cases it seems to me that the difference is within such an arbitration clause as this. In view, however, of phrases to be found in the report of some earlier decisions, the availability of the arbitration clause when "frustration" is alleged to have occurred will require closer consideration.

Turning now to the other question which I have called (*a*), what is the present dispute about? The answer has to be gathered from the affidavits filed in the application to stay, from the correspondence before writ exhibited to these affidavits and from the endorsement on the writ itself. The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party "repudiates" it. That is not so. "I have never been able to understand," said Scrutton L.J. in *Golding* v. *London & Edinburgh Insurance Co., Ld.* (1), "what effect the repudiation of one party has "unless the other party accepts the repudiation." If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance: a classic example of this is to be found in *Avery* v. *Bowden* (2). Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) "accept the repudiation," by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages. "Rescission (except by mutual consent or by a competent "court)" said Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (3) "is the right of one party, arising upon "conduct by the other, by which he intimates his intention "to abide by the contract no longer. It is a right to treat "the contract as at an end if he chooses, and to claim damages "for its total breach, but it is a right in his option." But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other. Thus, in *General Billposting Company, Ld.* v. *Atkinson* (4), where the respondent's engagement as manager of the appellant company was subject to twelve months' notice and the latter wrongfully dismissed him without notice, Lord Collins (with whose judgment Lord Halsbury expressly concurred) said (1): "I think the true test applicable to the facts of this case is "that which was laid down by Lord Coleridge C.J. in *Freeth* "v. *Burr* (2), and approved in *Mersey Steel & Iron Co., Ld.* v. "*Naylor* (3) in the House of Lords, 'that the true question is "whether 'the acts and conduct of the party evince an in-"'tention no longer to be bound by the contract.' I think the "Court of Appeal had ample ground for drawing this inference "from the conduct of the appellants here in dismissing the "respondent in deliberate disregard of the terms of the "contract, and that the latter was thereupon justified in "*rescinding the contract* and treating himself as absolved from "the further performance of it on his part." In the present case, the proper form in which to seek relief under the first head of the endorsement of the writ would be to ask for a declaration that the agreement had been terminated by the wrongful repudiation by the defendants which had been accepted by the plaintiffs. The issue of the writ may, however, sometimes be regarded as amounting to the exercise of the plaintiffs' claim to rescind and for the purposes of the appeal I am content so to regard it.

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(1) (1932) 43 Ll. L. Rep. 487, 488.

(2) (1855) 5 E. & B. 714.

(3) [1926] A. C. 497, 509.

(4) [1909] A. C. 118,.

But, even so, I do not see how this claim, however expressed, together with the other claims in the writ, can be regarded otherwise than as involving a dispute "in respect of the "agreement" and in respect of something arising out of it. The fallacy of the other view arises from supposing that, if the respondents have so acted as to refuse further performance of the agreement, this amounts to saying that they deny that the agreement ever existed. If the respondents were denying that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains, but that is not the position they take up. They admit the contract, and deny that they have repudiated it. Whether they have, or have not, is one of the disputes arising out of the agreement. Even if the arbitrator finds that they have, and that on the appellants' acceptance of the repudiation the contract is at an end, that finding does not oust the arbitrator's jurisdiction. "The proposition," said Lord Finlay in *Sanderson & Son* v. *Armour & Co., Ld.* (4),

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(1) [1909] A. C. 118, 122.

(2) (1874) L. R. 9 C. P. 208, 213.

(3) (1884) 9 App. Cas. 434.

(4) 1922 S. C. (H. L.) 117, 121.

"that the mere allegation by one party of repudiation of "the contract by the other deprives the latter of the right to "take advantage of an arbitration clause is unreasonable in "itself, and there is no authority to support it." Moreover, the damages due from the respondents for this breach of the obligations of the agreement, as well as damages for any other breaches of it, are also disputed matters arising " in respect of " the agreement.

I now turn to certain earlier decisions which, as they stand in the reports, may seem to restrict the application of an arbitration clause where the contract has, for some reason or another, come to an end. The first of these is the appeal to this House from Scotland in *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.* (1). The situation there was unusual —indeed, Lord Shaw, when offering an explanation of it thirteen years later in *Sanderson's* case (2), described the circumstances as " very singular and very special " and the case as " extremely complex." The Scottish firm who were respondents had agreed to supply plant to the appellants under a contract which was to be " deemed for all purposes "an English contract, enforceable in and subject to the "jurisdiction of the English courts," and the contract contained an arbitration clause agreeing, " in case any dispute or "difference shall arise between the purchasers and the con-"tractors " to refer it to arbitration under the English Act of 1889. The municipal council brought an action for damages in the Scottish courts, averring (inter alia) that the whole contract had been repudiated by the defenders. The Court of Session considered that it was necessary that the parties should ascertain from the English courts, by stated case, whether the arbitration clause applied. This House reversed this decision, holding that, as English law (unlike the law of Scotland) did not compel reference to arbitration even though the clause applied, the courts in Scotland had jurisdiction to entertain the cause. I regard this as the true ground of the decision, and in doing so I am following the view of it expressed by Viscount Finlay in *Sanderson's* case (3). There was a second ground which Lord Loreburn L.C. is reported (4) to have formulated thus : " If the course of action which is "established be that there has been repudiation or a breaking "of contract in the sense that the contract has been frustrated

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(1) 1909 S. C. (H. L.) 53.

(2) 1922 S. C. (H. L.) 117, 129.

(3) 1922 S. C. (H. L.) 117, 121.

(4) 1909 S. C. (H. L.) 53, 54.

"by the breach, then it would not be within the arbitration "clause." Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (1), indicated that he found this sentence obscure, and I share his difficulty. It is to be noted that it occurs in the report of a judgment which was delivered ex tempore, and was, apparently, never revised by the speaker, for the word " course " must surely be " cause." In any case, the decision to allow the appeal is sufficiently based on the first ground, which I prefer. Lord Shaw's observation in the same case (2) : " It does not appear to me to be sound law to "permit a person to repudiate a contract and thereupon "specifically to found upon a term in that contract which he "has thus repudiated "—is best understood as referring to the exercise of judicial discretion by refusing a stay, for it seems impossible to construe the language of an arbitration clause as though its range could be reduced by the action of one of the parties. Its range depends on its terms, and if its terms are wide enough to cover a dispute whether one party has repudiated, or as to damages due to repudiation, the fact that there has been repudiation may in some cases incline the judge to let the action proceed, but will not alter the interpretation of the clause itself.

The next case calling for special examination is *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* (3). Here, again, the decision was not reserved, and here, again, the speeches do not all give the same ground for allowing the appeal. Viscount Haldane L.C. who had during the argument referred to the above observation of Lord Shaw in the *Johannesburg* case (2), said (4): "Now, my Lords, speaking for "myself, when there is a repudiation which goes to the "substance of the whole contract I do not see how the person "setting up that repudiation can be entitled to insist on a "subordinate term of the contract still being enforced." By the person setting up the repudiation is meant the insurance company, which denied liability under the policy on the ground that the appellants had set fire to their own property, and it is not at all clear to me why, if the policy contained an arbitration clause covering all claims arising under the policy, it should not cover such a dispute. But the arbitration clause in the policy was not framed so widely. It applied "if any difference arises as to the amount of any loss or

(1) [1926] A. C. 497, 511.
(2) 1909 S. C. (H. L.) 53, 56.
(3) [1915] A. C. 499.
(4) Ibid. 505.

"damage," and provided that "it shall be a condition precedent "to any right of action or suit upon this policy that the award "by such arbitrator, arbitrators, or umpire of the amount of "the loss or damage if disputed shall be first obtained." Lord Dunedin pointed out (1) that the arbitration clause only applied to differences as to amount of loss, and, therefore, not to a claim which the respondents rejected altogether, whatever the loss might be. Lord Atkinson (1) rested his judgment on this last point alone. Lord Parker concurred without distinguishing reasons. Lord Parmoor said expressly (2) that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application. It is on this second ground that I think the majority of the House should be regarded as having decided the appeal.

Last, in this trilogy of difficult decisions, comes the judgment of the Judicial Committee in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (3). It was the case of a time charterparty, where the ship was requisitioned on behalf of His Majesty's government before the date at which she was to have entered upon the performance of the charter and remained in government service until more than a year had elapsed after the period of ten months during which her service under the charter was to have been rendered. Lord Sumner's judgment contains an elaborate and authoritative exposition of the nature of frustration, and a contrast between the operation of frustration, which is automatic, and the consequence of wrongful repudiation, which depends on the choice of the other party. On this point, the judgment has always been regarded as a pronouncement of the highest authority, but I confess to considerable difficulty in accepting the conclusion that the dispute whether such a requisition had frustrated the performance of the charterparty, or whether on the other hand, the shipowner was entitled to damages for the charterers' refusal to take delivery of the ship when she was at length released, was not a "dispute arising under this "charter." Lord Sumner held that it was not, on the ground that the execution of the contract had not begun, and that the dispute first arose when "this charter" no longer existed. A decision of the Judicial Committee is not binding on this House—nor indeed on the courts below: *Leask* v. *Scott* (4);

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(1) [1915] A. C. 499, 507.
(2) Ibid. 508.
(3) [1926] A. C. 497.
(4) (1877) 2 Q. B. D. 376, 380.

and, while any opinion delivered by Lord Sumner must command the respect due to that great master of the law, I think the judgment in *Hirji Mulji's* case (1), so far as the effect of frustration of contract on an arbitration clause is concerned, must not be taken as having established a general rule. Ordinarily speaking, there seems no reason at all why a widely drawn arbitration clause should not embrace a dispute whether a party is discharged from future performance by frustration, whether the time for performance has already arrived or not.

My Lords, it is of much practical importance that the law should be quite plain as to the scope of an arbitration clause in a contract where the clause is framed in wide and general terms such as this, and I trust that the decision of the House in this appeal may be useful for this purpose and will remove any misunderstanding which may have grown up out of certain phrases in some of the previous decisions to which I have referred. At the risk of some repetition, I would summarize what I conceive to be the correct view on the matter as follows. An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of," or "with regard to," or "under" the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland), such

(1) [1926] A. C. 497.

an arbitration clause would also confer authority to assess damages for breach, even though it does not confer on the arbitral body express power to do so.

I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has "come to an end," as, for example, by frustration. In such cases it is the performance of the contract that has come to an end. The doctrine of discharge from liability by frustration has often been explained as flowing from the inference of an implied term, and in giving my opinion on the occasion of the recent decision of this House in *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (1), I expressed the view that the most satisfactory basis upon which the doctrine can be put is "that it depends on an implied term in the contract of the "parties." If, therefore, when parties have entered into a contract, circumstances arise before the performance of the contract is completed which, in the view of one party, bring the contract to an end by frustration, and, therefore, discharge both parties from further performance, but the other party does not agree, this is a difference about the applicability of the implied term and is just as much within the arbitration clause as if it were a difference about an express term of the contract. There is a previous decision of this House which establishes this precise proposition. I refer to *Scott & Sons, Ld.* v. *Del Sel* (2), where sellers of jute contended that a contract to export from Calcutta 2800 bales to Buenos Ayres was brought to an end, after a portion had been dispatched, by a government prohibition of further export, notwithstanding that the contract contained an express term exempting the sellers from liability for late delivery due to unforeseen circumstances. The arbitration clause ran: "Any dispute that may arise "under this contract to be settled by arbitration." The sellers argued that the dispute as to frustration was not a dispute under the contract, but a dispute as to the existence of the contract. This contention was unanimously rejected. Lord Dunedin reasons thus (3): "They (the sellers) can only "succeed . . . . if they bring themselves within one of two "categories. Either they must show that there was an "express term of the contract which had that effect," i.e., of bringing the contract to an end, "or they must show that there

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(1) Ante, p. 154, 163.

(2) 1923 S. C. (H. L.) 37.

(3) Ibid. 41.

"was an implied term in the contract which had the same "effect. That an implied term in a contract may have that "effect is quite clearly shown by what was decided in this "House in the case of *Tamplin Steamship Co.* (1) and in the case "of the *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (2). "It seems to me, therefore, that they are in this dilemma, "that in either view they have got to have recourse to the "contract, and, if they have got to have recourse to the "contract, it seems to me that the dispute is a dispute under "the contract."

I can see no reason why an arbitration clause framed on the above lines should not equally apply if the supervening event which is alleged by one side to have effected discharge by frustration occurs after the contract has been entered into but before the time has come for anything to be done under the contract. Lord Dunedin's reasoning applies equally to both cases. It is, in my opinion, fallacious to say that because the contract has " come to an end " before performance begins, the situation, so far as the arbitration clause is concerned, is the same as though the contract had never been made. In such cases, a binding contract was entered into, with a valid submission to arbitration contained in its arbitration clause, and, unless the language of the arbitration clause is such as to exclude its application until performance has begun, there seems no reason why the arbitrator's jurisdiction should not cover the one case as much as the other.

In this summary it is not necessary to deal with the situation which arises when a contract stipulates that the arbitration must take place before an action can be brought (as in *Scott* v. *Avery* (3)), or with the difficult question whether an arbitration clause covers a dispute as to the ambit of the submission (see Lord Parker's observations in the *Produce Brokers Co., Ld.* v. *Olympia Oil and Cake Co., Ld.* (4). Two further observations must be made in conclusion. The first is that, notwithstanding the general validity of the above observations, the governing consideration in every case must be the precise terms of the language in which the arbitration clause is framed. Its terms may, of course, be such as will either expressly or by implication reduce what would otherwise be the full ambit of the clause, or again, will extend it yet further. Secondly, what I have endeavoured to formulate

(1) [1916] 2 A. C. 397.
(2) [1918] A. C. 119.
(3) [1855] 5 H. L. C. 811.
(4) [1916] 1 A. C. 314, 327.

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in this summary is concerned solely with the question whether or not an arbitration clause applies. It has nothing to do with the further and quite distinct question whether, where an action is started in the English courts about a dispute which is within the scope of an arbitration clause, the action should be stayed at its inception under s. 4 of the Arbitration Act, 1889. The principles which should govern the exercise of judicial discretion on this matter have often been laid down and are well understood, and the extent to which appellate authority may interfere was last stated in this House in the case of *Charles Osenton & Co.* v. *Johnston* (1). I think the Court of Appeal was right in reversing Cassel J.'s decision on this head. Even if the learned judge were right in regarding the issue as one in which nothing but a question of law is involved, that circumstance would not necessarily and in all cases make it right to refuse a stay: Lord Parker's observation in *Bristol Corporation* v. *John Aird & Co.* (2) refers to a question of construction. Moreover, in the present case questions of fact may well have to be determined and the dispute as a whole is of a class which is constantly dealt with by an arbitrator. There is no sufficient reason why the matter should not be referred, and therefore, by the express language of s. 4, there must be a stay. In my opinion, this appeal fails on all points, and I move that it be dismissed with costs.

LORD MACMILLAN. My Lords, I am desired by my noble and learned friend, Lord Russell of Killowen, to say that he has had an opportunity of seeing in print the opinion which I am about to deliver, and that he agrees with it on all points.

I agree with the view which I believe is shared by all your Lordships that this appeal should be dismissed. On its own facts the case presents no great difficulty, but, as I understand that leave to appeal was granted in this instance on the representation that the case raised general questions affecting the efficacy of arbitration clauses on which some doubt had arisen and as your Lordships have heard full arguments on these questions, I shall express as briefly as I can the conclusions which I have reached.

The law permits the parties to a contract to include in it as one of its terms an agreement to refer to arbitration disputes which may arise in connection with it, and the courts of England enforce such a reference by staying legal proceedings

(1) Ante, p. 130, 138, 139.

(2) [1913] A. C. 241, 261.

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in respect of any matter agreed to be referred "if satisfied "that there is no sufficient reason why the matter should not "be referred in accordance with the submission": Arbitration Act, 1889, s. 4. Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

Arbitration clauses in contracts vary widely in their language for there is no limitation on the liberty of contracting parties to define as they please the matters which they desire to submit to arbitration. Sometimes the reference is confined to practical questions arising in the course of the execution of the contract; sometimes the most ample language is used so as to embrace any question which may arise between the parties in any way relating to the contract. Consequently, many of the reported cases are concerned with the interpretation of the scope of the terms of reference, for an arbitrator has jurisdiction only to determine such matters as, on a sound interpretation of the terms of reference, the parties have agreed to refer to him. In the ordinary case the ascertainment of the nature of the dispute and the interpretation of the terms of reference are matters of no special difficulty. Of recent years, however, certain views have been advanced and have received considerable judicial encouragement which have tended to introduce an unfortunate element of perplexity as affecting the application and efficacy of arbitration clauses in cases in which the contract is said to have been repudiated. Dicta of high authority have caused doubts which subsequent explanations cannot be said to have successfully removed. The arguments at the bar in the present case have illustrated the persistence of this uncertainty.

I may clear the ground by disposing of one or two simple cases. If it appears that the dispute is whether there has

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ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject-matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement. All this is more or less elementary.

I now come to the type of case which has given rise to controversy. Such cases arise in this way. One of the parties to a contract evinces by his conduct or openly declares his intention not to fulfil his obligations under the contract. He is then commonly said to have "repudiated" the contract, an ambiguous phrase which has, I think, been the source of much misunderstanding. A good illustration of so-called repudiation by conduct is afforded by *Forslind* v. *Bechely-Crundall* (1), and of so-called declared repudiation by *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.* (2). Where there has been such repudiation by one party of his contract obligations the other party may either acquiesce and betake himself to a claim of damages for breach or may contest the repudiation, but if his protests are unavailing, as he cannot in general enforce specific implement, his only remedy in the end is also a claim of damages for breach. If there is a clause in the contract referring to arbitration all disputes under or arising out of or relating to the contract, what is the effect of the repudiation on its efficacy? According to one view, the repudiation excludes the operation of the arbitration clause, or at least precludes its enforcement at the instance of the party who has repudiated. Thus, in the *Johannesburg* case (1), Lord Loreburn L.C. said (2): " If the "course [? cause] of action which is established be that there has "been repudiation or a breaking of contract in the sense that "the contract has been frustrated by the breach, then it would "not be within the arbitration clauses in either of these "contracts." Another way of approaching the question appears in the speech of Lord Shaw in the same case where he said (3): " As these averments stand, this contract was "wholly repudiated. It does not appear to me to be sound law "to permit a person to repudiate a contract and thereupon "specifically to found upon a term in that contract which he "has thus repudiated." To the same effect Lord Haldane L.C. in *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.*, said (4): " Speaking for myself, when there is a "repudiation which goes to the substance of the whole contract "I do not see how the person setting up that repudiation can "be entitled to insist on a subordinate term of the contract "still being enforced." These dicta, in view of their high authority, are entitled to the most careful consideration, but with all respect I do not think they constitute pronouncements in law by this House such as to be binding on your Lordships. To take first Lord Loreburn's dictum, I confess that I find it obscure, without expressing myself so bluntly as Lord Sumner, who in a subsequent case prefaced his comment on the dictum with the words: " Whatever exactly this sentence means "—*Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (5). It certainly does not say that repudiation destroys the contract and with it the arbitration clause which it contains. As Lord Dunedin, then Lord President, said in this same *Johannesburg* case (6), in the Court of Session, after pointing out that the defenders there " threw up the whole contract " and the pursuers replied " We see you cannot go on, you have so utterly broken "the contract that we hold it at an end and we will claim "damages for breach," at once added: " That does not mean "that the contract is gone for ever; on the contrary the "contract remains and is only the measure of liability for "damages." The decision of the Court of Session was recalled by this House, but on special grounds not affecting the passage I have quoted from Lord Dunedin's judgment.

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(1) 1922 S. C. (H. L.) 173.

(2) 1909 S. C. (H. L.) 53.

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(1) 1909 S. C. (H. L.) 53.
(2) Ibid. 54.
(3) Ibid. 56.
(4) [1915] A. C. 499, 505.
(5) [1926] A. C. 497, 511.
(6) 1909 S. C. 860, 878.

Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters, why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective? A partial breach leaves the arbitration clause effective. Why should a total breach abrogate it? The repudiation being not of the contract but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation? I do not think that this is the result of what is termed repudiation. Suppose the injured party prefers to have his claim of damages for the other party's total breach assessed by arbitration, can he not invoke and enforce the arbitration clause for that purpose? Can he be effectually met by a plea on the part of the wrongdoer that the wrongdoer has repudiated the contract and with it the arbitration clause which is consequently no longer operative? I do not think that this result follows even if the injured party acquiesces in the total breach—accepts the repudiation, as it is put—and contents himself with his claim of damages. I think he is entitled to insist on having his damages assessed by arbitration notwithstanding the other party's repudiation.

¶ I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement. Moreover, there is the further significant difference that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts.

I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.

There still remains the difficulty raised by the dicta of Lord Shaw and Lord Haldane which I have quoted. It is said to be wrong to allow a party to a contract who has refused to perform his obligations under it at the same time to insist on the observance of a clause of arbitration embodied in the contract. The doctrine of approbate and reprobate is said to forbid this. I appreciate the apparent dilemma, but with the greatest respect I venture to think it is based on a misapprehension. The key is to be found in the distinction which I have endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other. I can see nothing shocking or repugnant to law in one business man saying to another that he regrets he finds himself unable to go on with his deliveries under a contract between them and at the same time asking the other to join with him in a reference under an arbitration clause in their contract to ascertain what compensation is to be paid for his default. The parties have both agreed that all questions between them shall be settled by their own tribunal. The question of the consequences which are to follow from a breach, including a total breach, of the obligations undertaken by one of the parties is just such a question as both parties have agreed should go to arbitration. It is not a case of one party refusing to perform the obligations he has undertaken in favour of the other and at the same time insisting that obligations in favour of himself shall continue to be performed. The arbitration clause, as I have said, is not a stipulation in favour of either party. I am, accordingly, of opinion that the doctrine of approbate and reprobate does not apply to prevent a party to a contract who has declined to proceed further with the performance of his obligations to the other party from invoking an arbitration clause in the contract for the purpose of settling all questions to which his declinature has given rise. In all this I have assumed that the arbitration clause in its terms is wide enough to cover the dispute.

It remains to mention the special case of a contract which has been frustrated, in the technical sense which that word has now acquired. In the *Hirji Mulji* case (1) it was held in the Privy Council that, where a contract had been frustrated before performance had begun in consequence of a government requisition, the contract had terminated as to all matters and disputes which had not already arisen and the arbitration clause had ceased to be operative. I do not propose to express any opinion as to the effect of frustration in the technical sense on arbitration clauses, as the matter has not been fully argued, but I should not like to be taken as accepting without further consideration some at least of the views expressed by Lord Sumner on behalf of the Board in the case just quoted.

In what I have said I have purposely not entered on any detailed examination of the reported cases, preferring to express the result of my study of them in my own words. I am not conscious of having gone counter to any decision of this House, though I have found it necessary respectfully to differ from views incidentally expressed in some of the cases. Applying to the present appeal the principles I have endeavoured to formulate I have no doubt

(1) [1926] A. C. 497.

that the dispute between the appellants and the respondents, the nature of which has been fully set out by my noble and learned friend on the woolsack, is one which falls within the arbitration clause in the contract between them and that nothing has occurred to deprive that clause of its binding efficacy. I am also satisfied that in the circumstances the Court of Appeal were justified in overruling the discretion exercised by the learned judge of first instance in declining to grant a stay. I have only to add that having had the advantage of reading in print the speech of my noble and learned friend the Lord Chancellor, I desire to express my agreement with the general conclusions which he has reached.

LORD WRIGHT. My Lords, the contention on behalf of the appellants was that the respondents by their conduct and by their letters had evinced an intention not to perform the agreement any more and had thereby repudiated it, and that the appellants had evinced acceptance of that repudiation by the issue of the writ, and that, accordingly, the principle enunciated in this House by Lord Shaw in *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.*, applied. He said (1): "It does not appear to me to be sound law "to permit a person to repudiate a contract and thereupon "specifically to found upon a term in that contract which he "has thus repudiated." In the same case Lord Loreburn L.C. is reported to have said (2): "If the course [query, cause] "of action which is established be that there has been repudiation or a breaking of the contract in the sense that the "contract has been frustrated by the breach, then it would "not be within the arbitration clauses." Other general observations to the same effect were quoted from the authorities. If a party repudiates the contract as a whole, he cannot, it is said, rely on some particular stipulation, such as an arbitration clause. So much doubt has been thrown on these general observations by decisions to which I shall refer later that they cannot now be regarded as authoritative expressions of the law.

It is clear that, as the arbitration clause is a matter of agreement, the first thing is to ascertain according to ordinary principles of construction what the parties have actually agreed, but under s. 4 of the Arbitration Act, 1889, the court is given a discretionary power to stay an action brought in breach of an arbitration clause. Such a clause therefore, though absolute in terms, is qualified in the sense that it is subject to this overriding discretion of the court, and a general distinction may be noted. The contract, either instead of, or along with, a clause submitting differences and disputes to arbitration, may provide that there is to be no right of action save on the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition to any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect unless the condition has been "waived," that is, unless the party seeking to set it up has somehow disentitled himself to do so. The distinction between a mere submission and such a clause is clearly stated by Warrington L.J. in *Woodall* v. *Pearl Assurance Co., Ld.* (1). A submission may, however, take many different forms. It may be a special agreement to arbitrate on a particular dispute which has already arisen on some matter, such as contract, tort, trust or family arrangement. Thus, to take a single instance, in *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (2), recently decided by this House, there was a specific submission of the difference whether the charterparty in question had been frustrated, the charterers claiming damages because the vessel had not been tendered to load her cargo, the shipowners defending the claim on the ground of frustration. That illustrates clearly one aspect of an arbitration agreement, namely, that it is collateral to the substantial stipulations of the contract. It is merely procedural and ancillary, it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court. All this may be said of every agreement to arbitrate, even though not a separate bargain, but one incorporated in the general contract. It may also be noted that the agreement to arbitrate depends on there being a dispute or difference in respect of the substantive stipulation. It appertains to the stage of pleadings or allegations. It is in regard to these that it has to be decided whether the submission applies or should receive effect. It is interlocutory. Again, the illustration I have given shows that there may be an agreement to arbitrate on a question on a contract which has on one view ceased to exist, at least as to future performance, though whether it has ceased to exist or not is disputed, or, if that is not disputed, the question

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(1) 1909 S. C. (H. L.) 53, 56.

(2) Ibid. 54.

(1) [1919] 1 K. B. 593, 607.

(2) Ante, p. 154.

of damages remains in dispute. It must depend on the construction of the collateral agreement contained in the arbitration clause, whether that agreement survives and can be insisted on for the settlement of these disputes. It may also be essential to distinguish between the ordinary submission of disputes and the stipulation that an award is a necessary condition of any right of action. Again the discretionary power of the court to stay under s. 4 of the Act, which only arises if the dispute falls within the clause must be kept distinct from the question of the scope and effect of the clause, which depend on its language.

The word "repudiation" has also led to difficulties because it is an ambiguous word constantly used without precise definition in contract law. I do not attempt an exhaustive list of the senses in which the word has been used, but I may give some instances. Repudiation of a contract is sometimes used as meaning that the defendant denies that there ever was a contract in the sense of an actual consensus ad idem. If that is the case, a submission of disputes under the contract never comes into operative existence any more than the contract to which it was to be ancillary. Short of this, one party, though not denying that there was the appearance of assent, might claim that the consent was vitiated by fraud or duress or mistake or illegality, and in that sense it is often said that he repudiates the contract. There, again, it would be a question of construction whether the collateral arbitration clause could be treated as severable and could be invoked for settling such a dispute. There is, however, a form of repudiation where the party who repudiates does not deny that a contract was intended between the parties, but claims that it is not binding because of the failure of some condition or the infringement of some duty fundamental to the enforceability of the contract, it being expressly provided by the contract that the failure of condition or the breach of duty should invalidate the contract. A dispute on such an issue would generally be within an ordinary submission of disputes under or arising out of the contract or similar words, though the award in a certain event might have the effect of declaring that the contract had ceased to be, or even had never become, binding. Another case to which the word repudiation is applied is when the party, though not disputing the contract, declares unequivocally that he will not perform it and, admitting the breach, leaves the other party to claim damages.

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There may then be a dispute under the contract, not indeed as to liability but as to damages. Such a dispute would normally fall within the ordinary submission, which should receive effect unless the court exercises its discretion to refuse to stay under s. 4. Except as influencing the exercise of that discretion, I cannot see how defiance or truculence of the party can affect the matter. He is simply breaking his contract. But perhaps the commonest application of the word "repudiation" is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages either for previous breaches or for the breach which constitutes the repudiation. That is only a particular form of contract-breaking and would generally under an ordinary arbitration clause involve a dispute under the contract like any other breach of contract. There is no difference, for instance, for this purpose between a refusal to take further instalments under a contract for the sale of goods by instalments and a refusal to take the entire contract quantity where the tender is to be a single delivery. I need scarcely add that one party to a contract cannot put an end to it. To produce that effect there must be rescission. An anticipatory breach does not necessarily involve an actual intention to break the contract. Intention is to be judged by the party's conduct. The difference between repudiating a contract and repudiating liability under it must not be overlooked. It is thus necessary in every case in which the word repudiation is used to be clear in what sense it is being used. The next step is to examine the arbitration clause. If the case falls within the arbitration clause, there has still to be considered whether the court should refuse to stay under s. 4.

In the present appeal I think the Court of Appeal were right in holding that the disputes were disputes within the clause, and that there were no sufficient reasons to apply s. 4. This latter is a distinct question which I shall discuss later. I have assumed for purposes of this case, what I very much doubt, that the allegation in the writ showed a prima facie case of anticipatory breach and rescission. This assumption enables the appellants to raise their main contention, which I take to be that the repudiation and rescission had put an end to the contract and the arbitration clause with it. In my opinion, if I may apply the words of Lord Finlay in a similar case, this contention "is unreasonable in itself and there is "no authority to support it." The case to which I refer is *Sanderson & Son* v. *Armour & Co., Ld.* (1), where buyers brought an action in the Scottish courts for damages under a contract for the sale of goods by instalments, alleging that the first instalment was so bad that they were entitled to refuse to accept other instalments without first being given an opportunity to examine them. When the sellers refused this opportunity, the buyers claimed to rescind and brought an action for damages, whereupon the sellers invoked the arbitration clauses in the contracts under which disputes arising out of or on the contracts were submitted to arbitration. It was held by this House, affirming the courts below, that the dispute was covered by the submission. In answer to objections based on the observations which I have quoted from the *Johannesburg* case (2) Lord Finlay observed: "The proposition that the mere allegation by one party of repudiation "of the contract by the other deprives the latter of the right "to take advantage of an arbitration clause is unreasonable "in itself, and there was no authority to support it." Lord Dunedin and Lord Shaw agreed that the submission must receive effect. Their Lordships found difficulty in explaining the observations in the *Johannesburg* case (2). That action was brought in the Scottish courts. It involved claims on complicated constructional contracts which included arbitration clauses. Some of the contracts were to be construed according to English law, which differs from Scots law in that the English Act gives a discretion to the court whether or not to stay the action, whereas under the Scottish Act the submission is mandatory so that the court has no discretion but must refer. The appeal was eventually decided by this House by referring back the matter to the Scottish court to exercise its discretion under s. 4 of the English Act. From this point of view the dicta which I quoted were not material to the decision. Lord Loreburn's observation which I have quoted is certainly somewhat cryptical, and in *Hirji Mulji's* case (3), Lord Sumner, observing that it did not help the appellants, added: "whatever exactly this sentence means."

(1) 1922 S. C. (H. L.) 117, 121.
(2) 1909 S. C. (H. L.) 53, 54, 56.
(3) [1926] A. C. 497, 511.

Lord Shaw's observations are explained by Lord Dunedin in *Sanderson's* case (1) as to be taken secundum subjectam materiam. The distinction was taken that in the *Johannesburg* case (2) the repudiation was admitted, but this does not appear a sound distinction. On the whole, I think it is impossible to find any clear guidance as to principle or practice from the *Johannesburg* case (2) except that it affords an instance of the court's discretion under s. 4 of the English Arbitration Act. *Sanderson's* case (1) was expressly approved and applied by the Privy Council in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ld.* (3). Under a contract for the sale of goods the buyers rejected a tender of the whole contract quantity. It was not a sale by instalments. There was an arbitration under the general submission contained in the contract. In proceedings to set aside the arbitrator's award, it was contended that it was for the court to inquire whether there was a repudiation and consequent termination of the contract. If there was, it was said, the arbitration clause did not apply. Lord Dunedin, in delivering the judgment of their Lordships, said (3): "It is, therefore, "for the arbitrator and not for the court to decide what is "the effect of a rejection based on an award as to quality. "In truth this point is decided in terms by the recent case of "*Sanderson & Son* v. *Armour & Co.* (1). It was a Scotch "case, but in no way depended upon any peculiarity of the "law of Scotland." *Champsey Bhara's* case (3) was not indeed one of anticipatory breach, but it was a rejection of the whole delivery of goods under the contract, and in that sense might, if wrongful, be treated as an entire repudiation. In *Hirji Mulji's* case (4) Lord Sumner approved of *Champsey Bhara's* case (3) as an authority along with *Sanderson's* case (1) for the proposition that an arbitrator has jurisdiction to adjudicate on breaches of a contract partly or wholly performed and still in existence for the purpose of awarding damages for such breaches already committed, even though it is determined as regards future performance by repudiation on one side and acceptance by the other. Having regard both to principle and authority, I read this proposition as including damages for anticipatory breach, where rescission follows.

These authorities, in my opinion, cover specifically the present case. It is true that the breach is only complete and enforceable at the moment of rescission so that breach and termination of the contract are simultaneous. So, indeed, they are in the case of a single entire breach like the rejection in *Champsey Bhara's* case (1). Lord Sumner's distinction, implied in the words "still in existence," was applied by him in *Hirji Mulji's* case (2) where he refused to hold that a submission of disputes "*under*" the contract covered a dispute whether there was frustration of the contract, on the ground that when the dispute arose the contract had ceased to exist and so had the arbitration clause along with it. This decision, though the case was one of frustration of contract, was relied on before your Lordships in argument as casting doubt on the general principle which I have been stating. The question in *Hirji Mulji's* case (2) arose on a charterparty of a vessel which had been made subject to a requisition so prolonged (as it was eventually held by the Privy Council) that it defeated the adventure and abrogated the effect of a delay clause. When after two years the vessel was released, the shipowners required the charterers to complete the contract, but the charterers refused. The shipowners claimed damages. The charterers refused to pay. An arbitration was held under the submission, and the arbitrator awarded damages to the shipowner for breach of the contract, holding that there had been no frustration. An action was brought to enforce the award, and it succeeded until it came to the Privy Council where it was held that the action should be dismissed on the ground that the arbitrator had no jurisdiction because when, in 1919, the dispute arose the charter was already frustrated so that there could be no dispute under the contract which had ceased to exist. Frustration operates, said Lord Sumner in delivering the judgment of the Board (3), automatically. It strikes once and strikes no more. The contract then ceases to exist for all purposes, save the enforcement of claims vested before that date, of which there were none in the case before the Board. I confess I feel some difficulty in reconciling this decision with views expressed by this House in *Scott & Sons, Ld.* v. *Del Sel* (4), where a claim for damages was defended on the ground that performance had been prevented by a government prohibition. This defence was relied on either

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(1) 1922 S. C. (H. L.) 117, 127.
(2) 1909 S. C. (H. L.) 53, 54, 56.
(3) [1923] A. C. 480, 489.
(4) [1926] A. C. 497, 503.

(1) [1923] A. C. 480, 489.
(2) [1926] A. C. 497.
(3) [1926] A. C. 497, 509.
(4) 1923 S. C. (H. L.) 37.

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on the basis of an express condition of the contract or on the ground of delay frustrating the contract. The question was whether the arbitration clause was still operative. Lord Dunedin was of opinion (1) that in either event there was a dispute *under* the contract within the submission. Frustration depended, in his opinion, on an implied term of the contract. This is the explanation of the doctrine generally accepted by the English authorities, though for reasons which I have explained elsewhere, I prefer and substantially accept the explanation given by Lord Sumner in *Hirji Mulji's* case (2). But whichever explanation is accepted, the result ought, in my opinion, to be the same in regard to the present question. However automatic and immediate the frustration, or at whatever time it is operative, its effect must depend on the meaning of the contract and its operation in the events that occurred. Lord Buckmaster took the same view as Lord Dunedin, but Lord Cave and Lord Shaw decided the question simply on the express terms of the contract, and thought that questions of frustration and of implied terms were irrelevant.

As at present advised I find it difficult to distinguish a dispute where there is a claim for damages and the defence set up is that the contract is frustrated from any other defence, or to understand why such a dispute should be outside a submission of disputes *under* the contract. It is, no doubt, less difficult to treat these questions as falling within a submission of disputes arising *out of* or *in relation* to a contract, but I do not think such differences in words should be decisive. It is certainly desirable, if possible, to have broad and simple rules in these matters. Frustration, if it occurs, no doubt, puts an end to the contract for the future as much as does rescission after repudiation or any other whole breach, though in that case there is a claim for damages for the breach while in respect of frustration there is no claim for damages. The dispute in all such cases where frustration is alleged is whether there has been frustration at all, and such a dispute would seem logically to arise "under the contract" and to fall within the submission just as much as if the words had been "arising out of it." But the question is still open for decision in this House, and does not arise in this case, and I merely refer to it to say that, however answered, it would not help the appellants.

(1) 1923 S. C. (H. L.) 37. (2) [1926] A. C. 497.

Nor are the appellants helped by the rule that, generally speaking, a dispute whether the contract ever existed, as contrasted with the question whether it has been ended, is not within the usual form of submission of differences arising out of the contract or the like, because, if there was never a contract at all, there could never be disputes arising out of it. Ex nihilo nil fit. It is all a question of the scope of the submission. Hence, if the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction. This for example was applied by the Court of Appeal in *Toller* v. *Law Accident Insurance Co.* (1), but the position may be different where the contract contains a clause that in certain events it is not to be enforceable. This distinction is illustrated by *Woodall* v. *Pearl Assurance Co., Ld.* (2), an action on a policy which made an award a condition precedent to recovery. The policy contained a provision that any misstatement or suppression in the proposal and declaration on which the policy was based should render it null and void. It was held that a claim by the company that the policy was null and void under that provision was within the submission, and that the company were not repudiating the contract as a whole, but denying liability under it in reliance on its express terms. A similar conclusion was reached in *Stebbing* v. *Liverpool and London and Globe Insurance Co., Ld.* (3), in which Lord Reading C.J. said: " In truth the company is relying upon a "term of the policy which prevents the claimant recovering . . . . If they succeed in escaping liability that is by "reason of one of the clauses in the policy." These decisions were approved by Lord Sumner in *Macaura* v. *Northern Assurance Co., Ld.* (4), where he said: " The defendants do "not repudiate the policy or dispute its validity as a contract; "on the contrary they rely on it and say that according to "its terms, express and implied, they are relieved from "liability." I may observe the word " implied " is significant. The arbitrator is not limited to the mere words of the contract. On the same principle a submission of disputes arising out of the contract includes disputes as to the existence or non-existence of a custom as being " relevant to the true meaning

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(1) [1936] 2 All E. R. 952.
(2) [1919] 1 K. B. 593.
(3) [1915] 2 K. B. 433, 436.
(4) [1925] A. C. 619, 631.

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"and effect of the contract": Lord Parker in the *Produce Brokers'* case (1). In *Macaura* v. *Northern Assurance Co., Ld.* (2), it was contended that the defendant insurance company, by pleading that the plaintiffs had no insurable interest, had done the same thing as if they had pleaded the Gaming Act, and had on that ground claimed that there was no contract for arbitration or anything else. Lord Sumner pointed out the fallacy of that contention. A gaming contract is illegal and a nullity. Absence of reasonable interest would be a ground for refusing to pay the loss under a contract otherwise valid. Two recent cases in the Court of Appeal illustrate the principle laid down in *Woodall* v. *Pearl Assurance Co., Ld.* (3), that a denial of liability based on the express terms of the contract is in general different in its effect on the ordinary arbitration clause from a denial that there was ever a contract at all. These cases are *Golding* v. *London and Edinburgh Insurance Co., Ld.* (4), and *Stevens & Sons* v. *Timber and General Mutual Accident Insurance Association, Ld.* (5). In the latter case, it was observed by Romer L.J. that an arbitrator could not arbitrate on the rightfulness of a repudiation because if he held that the repudiation was not justified, but the rescission was justified, he would be awarding that the contract was gone and making an award against the existence of his own jurisdiction. I should prefer to put it that the existence of his jurisdiction in this, as in other cases, is to be determined by the words of the submission. I see no objection to a submission of the question whether there ever was a contract at all, or whether if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question. But in general the submission is limited to questions arising on or under or out of a contract which would, prima facie, include questions whether it has been ended, and if so, whether damages are recoverable, and if recoverable what is the amount.

I must, however, refer to the curious case of *Jureidini* (6), in which Lord Haldane made an observation much relied on by the appellants. That case had two features which require to be noted. One was that there was no submission except of differences as to the amount of loss. The other was that the award of the arbitrator of the amount of the loss or damage, if disputed, was to be a condition precedent to any right of action upon the contract. The contract was a fire policy. The assured claimed a loss by fire under it. The company resisted the claim on the ground that under the express terms of the policy all claim was to be forfeited if it was fraudulent or if the loss was due to the assured's wilful act or was with his connivance, and the company relied on both these grounds of forfeiture. The case went to trial before a judge and jury and judgment was given in favour of the assured for a sum of damages. The judgment was set aside by the Court of Appeal, which held that under the rule in *Scott* v. *Avery* (1), the courts could not enforce any obligation to pay unless the condition precedent of an arbitrator's award determining the amount had been fulfilled. It is clear that the difficulty in the plaintiff's way in the Court of Appeal arose from the condition precedent. It is also clear that the House of Lords, in reversing the decision of the Court of Appeal and restoring the judgment of the trial court, must have held that the condition precedent was for some reason not binding on the assured. It is unfortunate that the exact grounds on which the House so held are not definitely expressed, but I think that the ratio decidendi was that the company, by claiming that all benefit under the policy had been forfeited, had, in Lord Dunedin's words (2), "necessarily cut out the effect of clause 17 as "creating a condition precedent against all forms of action." Lord Atkinson and Lord Parmoor seem also to say that the condition precedent clause had no application because no difference had arisen (or, apparently, in the circumstances could arise) as to matters that could come within that clause. Lord Dunedin suggests that the company might have met the difficulty by having the issue of liability decided by a jury and requiring the amount of damage to be ascertained by an arbitrator. The observation of Lord Haldane which the appellants relied on was his statement (3) that "when there "is a repudiation which goes to the substance of the whole "contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the "contract still being enforced." It may be observed that this observation was solely that of Lord Haldane and was not concurred in by his colleagues and was not necessary to the ratio decidendi adopted by them. It may be simply another way of stating that the company by their conduct

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(1) [1916] 1 A. C. 314, 328.

(2) [1925] A. C. 619, 631.

(3) [1919] 1 K. B. 593.

(4) (1932) 43 Ll. L. Rep. 487.

(5) (1933) 102 L. J. (K. B.) 337, 344, 345.

(6) [1915] A. C. 499.

(1) 5 H. L. C. 811.
(2) [1915] A. C. 499, 507.
(3) Ibid. 505.

had waived the condition and disentitled them to rely on its non-fulfilment. If it means that the company, by making allegations which, if established, relieved them from liability under the terms of the policy, repudiated the contract, I do not think that it can be regarded as good law, nor is it consistent with the later authorities which I have cited. Lord Sumner in *Macaura* v. *Northern Assurance Co., Ld.* (1), states the effect of the decision in *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* (2), to be "that the defendants "could not both repudiate the contract in toto and require "the performance of a part of it *which only became performable* "*when liability was admitted or established.*" I have italicized these last words because I think they distinguish *Jureidini's* case (2) from cases like *Woodall* v. *Pearl Assurance Co., Ld.* (3), which Lord Sumner approved. In *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (4), he repeated much the same idea, adding " it is a case of approbation and reprobation." Perhaps what Lord Sumner means is that the company had somehow prevented the possibility of an arbitrator awarding damages if liability were established. It is familiar law that a party who has prevented fulfilment of a condition precedent cannot set up the fact of its non-fulfilment. It is, however, enough here to say that, on any view, *Jureidini's* case (2) does not, in my opinion, help the appellants.

The authorities, I think, sufficiently dispose of an argument based on the maxim that a party cannot both approbate and reprobate a contract, at least in reference to an ordinary submission as contrasted with a clause making an award a condition precedent, so that it is not merely collateral or procedural, but essential to the obligations of the contract. Like all maxims of the law, that maxim, though it has a proper but very limited application, is too vague and general to be applied without careful limitation, otherwise it is apt to be misleading, as many cases have shown. Recently, in *Lissenden* v. *C. A. V. Bosch, Ld.* (5), this House indicated what are the true metes and bounds of the maxim. Its most correct application is in relation to the equitable doctrine of election, but it is also used as meaning that a party cannot take the benefits of a contract without conforming to its onerous conditions. This, however, cannot truly be said of a man who, being sued for repudiation or breach of a contract, disputes the liability and claims the benefit of an arbitration clause to decide whether or not he is liable. He is in truth not reprobating the contract but approbating it. He is using it as a shield against the claim. This, I think, is abundantly clear from what I have already said and need not repeat, and from the authorities which I have cited. The maxim is also sometimes invoked to indicate conduct which disentitles a party to rely on conditions precedent, but the ordinary arbitration clause is not a condition of the contract.

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(1) [1925] A. C. 619, 631.
(2) [1915] A. C. 499, 597.
(3) [1919] 1 K. B. 593.
(4) [1926] A. C. 497, 512.
(5) [1940] A. C. 412.

But where it is used in reference to arbitration, the maxim has been relied on as a matter, not of law, but of discretion. This I think is the only correct use in this context. Section 4 of the Arbitration Act, 1889, makes the power of the court to stay an action under the arbitration clause a matter of discretion and not ex debito justitiae. Though the dispute is clearly within the arbitration clause, the court "may" still refuse to stay if, on the whole, that appears to be the better course. But the court must be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though in truth an arbitration clause is not of strict obligation, because it is, under s. 4, always subject to the discretion of the court. In the present case the judge (agreeing with the master) has exercised his discretion against the application of the arbitration clause. The Court of Appeal reversed the decision of the judge. The judge's discretion is indeed primary, but it is subject to appeal. The duty of appellate courts on an appeal against the exercise of a discretion has been examined by this House in *Evans* v. *Bartlam* (1) and in *Charles Osenton & Co.* v. *Johnston* (2). It is enough here to say that the appellate court will only set aside the discretionary order if satisfied that it is clearly wrong. It will make every reasonable presumption in favour of upholding the judge. It has been argued here that the order of Cassels J. was right, or at least was not so clearly wrong as to justify its being reversed. The judge in this case, like the master, has carefully set out his reasons in writing. His view in effect is that the broad issue is a question of law, apparently not so much on the construction of the contract as on that of the correspondence, whether in law or in fact or in both there has been a repudiation.

(1) [1937] A. C. 473.

(2) Ante, p. 130.

In my opinion, these reasons are not sufficient to justify staying the action. The judge seems to rely on the language which he quotes from Lord Parker in *Bristol Corporation* v. *John Aird, Ld.* (1) to the effect that " Everybody knows that with regard "to the construction of an agreement it is absolutely useless "to stay the action, because it will only come back to the court "on a case stated." Any expression of opinion falling from that great judge must receive the most careful consideration, but it would not be safe to tear it from its context and give it a general application. I need not quote authorities for what has been said so often, that under a general submission the arbitrator is appointed to decide issues both of fact and of law. In the background, indeed, is the court's jurisdiction to set aside an award if it is bad in law on its face, and the opinion of the court on issues of law may be invoked by means of cases stated under the Acts of 1889 and 1934, but, if the submission is general, it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law. In the present case I can find no sufficient reason. The dispute is of the most ordinary character. The correspondence pursues a course similar to that in hosts of other commercial disputes. I think that the judge has acted on an erroneous conception of the true rule in cases of this nature and that his order should be set aside.

Finally, I agree with the general conclusions on the matter summarized by the Lord Chancellor in the closing paragraphs of his opinion. I concur in the motion proposed.

LORD PORTER. My Lords, the substantial reason why your Lordships gave leave to appeal in this case was to invite a discussion of the somewhat difficult question whether an arbitration clause in a contract continues to be effective though the contract itself has been broken in a matter going to its root or has otherwise been terminated. The appellants were not, however, confined to an argument on this point and rightly invited your Lordships to consider other aspects of the matter. The propositions which they put forward were two in number: (1.) that the learned judge had the whole matter before him and, in deciding as he did, exercised his discretion in favour of the appellants, and that, in so doing,

(1) [1913] A. C. 241, 261.

he had followed no wrong principle and his discretion should therefore not be interfered with; (2.) that the contract had been repudiated in fact by the respondents owing to their refusal and continued failure to perform it, and also by their claim to accept the action brought by the appellants as a repudiation, and that, consequently, (*a*) the whole contract was at an end and with it the arbitration clause, or, at any rate, (*b*) the respondents who had repudiated it could not after such repudiation rely on the clause which formed one of its terms. Both are difficult problems, but I have come to the conclusion that the appellants are wrong.

Of the two the first was the more strongly pressed. The principle on which your Lordships' House will and a Court of Appeal should act in an appeal from the exercise of a judge's discretion is well known and has lately been restated in *Charles Osenton & Co.* v. *Johnston* (1), per Viscount Simon L.C.: "Appellate authorities ought not to reverse the order merely "because they would themselves have exercised the original "discretion, had it attached to them in a different way. But "if the appellate tribunal reaches the clear conclusion that "there has been a wrongful exercise of discretion in that no "weight, or no sufficient weight, has been given to relevant "considerations such as those urged before us by the appellant, "then the reversal of the order on appeal may be justified." In the present case we have the advantage, not only of the learned judge's decision, but also of the reasons on which it is founded. He states them as follows: "The broad issue here "is a question of law. In the circumstances it would be "more suitable for the case to start in the law courts than "before an arbitrator. While the agreement itself offers no "difficulty of construction, the correspondence which has "passed between the parties may." This is, I think, a misapprehension. The broad question is not one of law, but one of law and fact combined and of law dependent on the view of the facts taken by the tribunal which is to determine the issue. Indeed, a little later in his judgment the learned judge himself seems to recognize that the issue to be determined is not law alone. He says: "The court will be able to decide "much better than an arbitrator whether in law or in fact "or in both there has been a repudiation, whether in law or "in fact they were entitled to take up the attitude which they "did take up as revealed by the correspondence, whether

(1) Ante, p. 130, 138, 139.

"there has been a breach of agreement by either the plaintiffs "or the defendants which would entitle either the plaintiffs "or the defendants to damages, and various other matters "which, when the pleadings come to be drawn, will undoubtedly be raised." It is unnecessary to determine whether the learned judge is right in believing that such matters are better left to the decision of a court than that of an arbitrator. I can imagine it being contended, rightly or wrongly, that one versed in business disputes would be at least as good a tribunal as a lawyer, but that is not the question. The parties have chosen to refer their differences to arbitration, and to arbitration they should go in the ordinary course unless there is some good reason to the contrary, as, e.g., where there is nothing but law to be decided, as was the case in *Rowe Bros. & Co., Ld.* v. *Crossley Bros., Ld.* (1). In these circumstances it seems to me that there is no sufficient ground in law for refusing to stay the action, and in so deciding your Lordships would not simply be substituting the discretion of the House for that of the judge, but would be following the principles which should guide the action of tribunals in determining whether a case should be referred to arbitration or not.

If, then, there is no sufficient reason why the court should have exercised its discretion in staying the action, the appellant is thrown back on his contention that the contract between the parties has come to an end, and with it the arbitration clause which forms part of the contract. The argument is of wide application and has given rise to a mass of litigation in which it is not always easy to see the exact grounds on which a particular decision was based. *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.* (2); *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* (3), and *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (4), on the one side, and *Sanderson & Son* v. *Armour & Co., Ld.* (5); *Scott & Sons, Ld.* v. *Del Sel* (6), and *Macaura* v. *Northern Assurance Co., Ld.* (7), on the other, to quote only some of the cases which have reached your Lordships' House or the Privy Council, have been thought difficult of reconciliation one with another. I propose to consider the principles

(1) (1912) 108 L. T. 11.
(2) 1909 S. C. (H. L.) 53.
(3) [1915] A. C. 499.
(4) [1926] A. C. 497.
(5) 1922 S. C. (H. L.) 117.
(6) 1923 S. C. (H. L.) 37.
(7) [1925] A. C. 619.

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and results of those cases later. Meanwhile, I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends on the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises whether they have done so or not, or whether the alleged contract is binding on them, I see no reason why they should not submit that dispute to arbitration. Equally I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise whether there had been such fraud, misrepresentation or concealment in the negotiations between them as to make an apparent contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done. Indeed, the possibility of providing for such an arbitration and the difficulty of giving sufficiently precise expression to bring about the required result are both visualized by Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (1), when he says: "The arbitration clause is but part of the contract and, "unless it is couched in such terms as will except it out of the "results which follow from frustration, generally it will come "to an end too." And again (2): "It is unnecessary to "consider in what terms, if any, a clause might have been "framed which would have saved the clause alive in the "event of the frustration of the adventure and the charter."

An example of a clause held to be wide enough to include a determination of the ambit of the arbitrator's authority is to be found in *Willesford* v. *Watson* (3), where Lord Selborne L.C. said: "It struck me throughout that the endeavour of the "appellants has been to require this court to do the very thing "which the arbitrator ought to do—that is to say, to look "into the whole matter . . . . and to decide whether the thing "which is complained of is inside or outside of the agreement." On the other hand, in *Jureidini's* case (4) the matter submitted was a narrow one, the quantum of damage only. "This" (the arbitration) "clause" said Lord Dunedin in *Sanderson & Son* v. *Armour & Co., Ld.* (1), "may be of two characters. "It may be of a limited character, generally known as executory "arbitration providing for the adjustment of disputes concerned "with the working out of the contract. But it may also be of "a universal character, submitting all disputes which may arise "either in the carrying out of the contract or in respect of breach "of the contract after the actual execution has been finished."

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(1) [1926] A. C. 497, 505.

(2) Ibid. 511.

(3) (1873) L. R. 8 Ch. 473, 477.

(4) [1915] A. C. 499.

The question of the arbitrator's jurisdiction must, therefore, ultimately depend on the wording of the arbitration clause. As a rule, however, the arbitrator cannot clothe himself with jurisdiction. As Lord Parker said in *Produce Brokers Co., Ld.* v. *Olympic Oil and Cake Co., Ld.* (2): "The arbitrator cannot "make his award binding by holding contrary to the true "facts that the question which he affects to determine is "within the submission . . . . Where, however, the submission is contained in the contract it may be a question of "construction whether such expressions as 'all disputes arising "'under this contract' include questions as to the ambit of "the submission itself. Prima facie I do not think that they "would." The principle is repeated by Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (3), and need not be further illustrated, but this does not mean that in every instance in which it is claimed that the arbitrator has no jurisdiction the court will refuse to stay an action. If this were the case such a claim would always defeat an agreement to submit disputes to arbitration, at any rate until the question of jurisdiction had been decided. The court to which an application to stay is made is put in possession of the facts and arguments and must in such a case make up its mind whether the arbitrator has jurisdiction or not as best it can on the evidence before it. Indeed, the application to stay gives an opportunity for putting these and other considerations before the court that it may determine whether the action shall be stayed or not. The difficulty does not lie as a rule in deciding what tribunal is to determine the arbitrator's jurisdiction—that must generally be the function of the court, but it lies rather in finding what are the factors to be taken into consideration in deciding whether the arbitral contract remains in force or not.

(1) 1922 S. C. (H. L.) 117, 125.
(2) [1916] 1 A. C. 314, 327.
(3) [1926] A. C. 497, 502.

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Let me illustrate those difficulties by a reference to a few cases. In *Sanderson & Son* v. *Armour & Co., Ld.* (1) the headnote states, and I think states accurately, the effect of the decision in the words "Where a contract for the sale of "goods contains a clause referring all disputes arising out of "the contract to arbitration, the question whether one or "other of the parties has by his actings repudiated the contract "is a question for the arbiter." In *Hirji Mulji's* case (2), on the other hand, it was held that the question whether a contract had been frustrated was not a dispute "under the contract," at any rate, provided the dispute did not arise until after the contract had been frustrated, and that an arbitrator, who wrongly decided that it had not been frustrated, had no jurisdiction. It is true that in the former case the dispute was as to repudiation and in the latter as to frustration, but in each the question at issue was whether the contract, and with it the arbitration clause, was no longer binding. It is also true that in the earlier case the matter submitted was a dispute "arising out of " and in the latter a dispute " under " the contract, but both distinctions appear to have been treated as of no account in *Scott & Sons, Ld.* v. *Del Sel* (3), in which Lord Dunedin (himself a member of the Board which decided *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (2)) was dealing with a case where it was claimed that prohibition of export had resulted in frustration, and said "Either they " (i.e., those who claimed that the contract had been frustrated) "must show "that there was an express term of the contract which had that "effect " (i.e., the effect of frustration) "or they must show that "there was an implied term in the contract which had the same "effect. . . . . It seems to me therefore that they are in this "dilemma—that in either view they have got to have recourse "to the contract, and if they have got to have recourse to the "contract it seems to me that the dispute is a dispute under "the contract." It will be observed that this last case raised a question of frustration and that the word " under," not the phrase " arising out of it," required consideration. The only remaining difference which I can see is that in the *Del Sel* case (3) your Lordships' House held that the contract was not frustrated, whereas in *Hirji Mulji's* case (2) the Board held that it was, but the principle by which the arbitrator's jurisdiction is to be determined cannot be decided by asking whether he came to a right or a wrong conclusion. Moreover, the ground on which Lord Sumner relied in the Privy Council (namely, that, as no dispute arose until after frustration had taken place, the contract with all its terms had come to an end) would, I think, apply to all cases where frustration comes in issue and the question to be decided is whether there has been frustration or not.

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(1) 1922 S. C. (H. L.) 117.
(2) [1926] A. C. 497.
(3) 1923 S. C. (H. L.) 37, 41.

The divergence of view which is to be found between the decisions in the *Del Sel* (1) and *Hirji Mulji* (2) cases arose where the question at issue, was who is to decide whether there has been frustration or not, the court or the arbitrator appointed by the contract in respect of which frustration was said to have taken place, but the difficulty is not confined to frustration cases. Whatever the true ground of decision, there are expressions of opinion in *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.* (3), and *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* (4), which seem to indicate that, if one party to a contract repudiates it and if the other party accepts that repudiation, the contract and all its terms, including the arbitration clause, come to an end, and neither party can rely on its provisions. In the *Johannesburg* case (3) there were two arbitration clauses—one referring " differences arising between the parties," the other " disputes under the contracts." Lord Loreburn L.C. in that case said in his speech : " If the course (? cause) of "action which is established be that there has been repudiation "or a breaking of contract in the sense that the contract has "been frustrated by the breach, then it would not be within "the arbitration clauses in either of these contracts. If it "be established merely that a particular machine, or a particular "part of the contract, has not been executed as it should "be, but that the fault is such in degree and character that "it can be compensated by damages without frustrating the "contract, then it would normally be a question of arbitration." In *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.*, Viscount Haldane L.C. said (4) : " There has been "in the proceedings throughout a repudiation on the part "of the respondents of their liability based upon charges of "fraud and arson, the effect of which, if they are right, is "that all benefit under the policy is forfeited. But one of

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(1) 1923 S. C. (H. L.) 37, 41.
(2) [1926] A. C. 497.
(3) 1909 S. C. (H. L.) 54.
(4) [1915] A. C. 499.
(5) [1915) A. C. 499, 505.

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"the benefits is the right to go to arbitration under this "contract, ... and accordingly that is one of the things "which the appellants have, according to the respondents, "forfeited with every other benefit under the contract. When "there is a repudiation which goes to the substance of the "whole contract I do not see how the person setting up that "repudiation can be entitled to insist on a subordinate term "of the contract still being enforced." He went on to point out that the learned judge who tried the action gave judgment for 3000*l.* for the breach alleged, and continues: "I think "that was probably right, the arbitration clause having gone "with the repudiation."

Before dealing with these observations it is desirable to point out that it was recognized in *Sanderson & Son* v. *Armour & Co., Ld.* (1), and not, I think, controverted in *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.* (2), or *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* (3), that repudiation by one party has no effect unless it is accepted by the other. The statement of Scrutton L.J. in *Golding* v. *London and Edinburgh Insurance Co., Ld.* (4), already quoted by the Lord Chancellor, puts the point succinctly. But what is the effect of the decisions in your Lordships' House and elsewhere in cases in which there has been repudiation and acceptance? In *Stevens & Sons* v. *Timber and General Mutual Accident Insurance Association, Ld.* (5), Lord Romer, then Romer L.J., appears to have taken the view that the result would be to put an end to all future performance under the contract, including the right or obligation of going to arbitration. He said: "The plaintiffs "could upon that assumption" (i.e., on the assumption that there had been a repudiation of the contract altogether) "have elected to accept the repudiation and thereupon have "sued the defendants for damages. Had they done so the "arbitration clause would obviously have no operation." To the same effect Fletcher Moulton L.J. is reported to have said in *William Kennedy, Ld.* v. *Barrow-in-Furness Corporation* (6): "If the contract has by the repudiation of the defendants "ceased to exist, it is clear that neither party can rely upon "the arbitration clause."

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(1) 1922 S. C. (H. L.) 117.

(2) 1909 S. C. (H. L.) 53.

(3) [1915] A. C. 499.

(4) 43 Ll. L. Rep. 487, 488.

(5) 102 L. J. (K. B.) 337, 342.

(6) 2 Hudson on Building Contracts, 4th ed., 411, 415.

Cases of frustration merit, I think, separate consideration. At the moment I confine myself to accepted repudiation. In this type of case the argument that accepted repudiation puts an end to all future obligations under the contract (including the obligation to submit disputes to arbitration, at any rate in the case of the injured party) receives, I think, some support from both earlier and later editions of the work of Sir William Anson on Contracts. In the 9th edition (1899) at p. 294 he says: "If one of two parties to a contract breaks the obligation "which the contract imposes, a new obligation will in every "case arise, a right of action conferred upon the party injured "by the breach. Besides this there are circumstances under "which the breach will discharge the injured party from "such performance as may still be due from him. . . . By "discharge we must understand, not merely the right to "bring an action upon the contract because the other party "has not fulfilled its terms, but the right to consider oneself "exonerated from any further performance under the contract— "the right to treat the legal relations arising from the contract "as having come to an end, and given place to a new obligation, "a right of action." A similar view is expressed in the latest— the 18th edition of 1937, p. 330. The three sets of circumstances giving rise to a discharge of contract are tabulated by Anson as: (1.) renunciation by a party of his liabilities under it; (2.) impossibility created by his own act; and (3.) total or partial failure of performance. In the case of the first two, the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the course of performance. Moreover, if the third be partial, the failure must occur in a matter which goes to the root of the contract. All these acts may be compendiously described as repudiation, though that expression is more particularly used of renunciation before the time of performance has arrived.

What, then, is the effect of such repudiation if it be accepted? In such a case the injured party may sue on the contract forthwith whether the time for performance is due or not, or, if he has wholly or partially performed his obligation, he may in certain cases neglect the contract and sue upon a quantum meruit. In the former case he is still acting under the contract. He requires to refer to its terms at least to ascertain the damage, and he may require to refer to them also if the repudiation of the contract is in issue. In the latter case he is not proceeding under it but on quasi-contract. The obligations he incurs and the sum he recovers may differ from those provided in the contract and are not dependent on its terms. Indeed, the word "repudiation," accepted or unaccepted, is an ambiguous expression. As Scott L.J. pointed out in *Toller* v. *Law Accident Insurance Society, Ld.* (1): "It may mean: repudiate the original existence of the "contract. It may mean: disclose an intention to disregard "it in toto and refuse to be bound by its terms altogether. "Or it may mean: a mere contention that under the "terms of the contract the defendant is completely free "from liability by reason of some fact." Except in the first case the contract is not repudiated. Even in the second all that is repudiated is the defendant's future liability under it. Where the contract itself is repudiated in the sense that its original existence or its binding force is challenged, e.g., where it is said that the parties never were ad idem, or where it is said that the contract is voidable ab initio (e.g., in cases of fraud, misrepresentation or mistake), and that it has been avoided, the parties are not bound by any contract and escape the obligation to perform any of its terms including the arbitration clause unless the provisions of that clause are wide enough to include the question of jurisdiction. Where, however, the existence of the contract is acknowledged but one of its terms is relied on as disentitling the claimant to recover, the arbitration clause is effective. The distinction is pointed out in *Woodall* v. *Pearl Assurance Co., Ld.* (2), approved by Lord Sumner in your Lordships' House in *Macaura* v. *Northern Assurance Co., Ld.* (3). In this latter type of case it is true that the contract may be avoided even from its inception, but, as Lord Reading C.J. observed in *Stebbing* v. *Liverpool, London and Globe Insurance Co., Ld.* (4): "the phrase 'avoiding "'the policy' is loosely used. . . . . In truth the company "is relying upon a term of the policy which prevents the "claimant recovering . . . . If they succeed in escaping "liability, that is by reason of one of the clauses in the policy." Subject to the necessity for a careful scrutiny of the terms of the arbitration clause the law applicable to these two classes of cases is, I think, clear enough.

There remains the question: What result follows where the original existence and efficacy of the contract is not in

(1) [1936] 2 All E. R. 952, 958.
(2) [1919] 1 K. B. 593.
(3) [1925] A. C. 619, 631.
(4) [1917] 2 K. B. 433, 436.

dispute but one party has, or it is claimed that he has, refused to be bound by its terms and has disregarded it in toto and the other party has accepted his repudiation ? In such a case the question of damage has still to be determined and the question whether there has been repudiation may be still in issue. Are these disputes under the contract—I use the word " under " advisedly since expressions such as " arising out of " or "concerning " have a wider meaning ? I think they are. The contract must be adverted to in order to arrive at their solution. To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded. The injured party may, therefore, rely on the contract and apply to have the action stayed if he desires to do so. But what of the alleged wrongdoer ? Can he say to the injured party : " I have not broken the contract and as you must "go to its terms to find out if I have, our dispute arises under "the contract " ; or even : " Admittedly I have broken the "contract but it is still in existence, though you are excused "from further performance. Nevertheless damages have still "to be ascertained and for this you must go to the contract."

In discussing this question I leave aside all reference to the discretion of the court given under the Arbitration Act to stay or not to stay, merely observing that I do not see why in making up its mind the court should not take into consideration the fact that the wrongdoer has repudiated the contract. The argument, however, against allowing at any rate an admitted wrongdoer to go to arbitration has not been based solely on discretion. Lord Shaw said in the *Johannesburg* case (1) : " It does not appear to me to be "sound law to permit a person to repudiate a contract and "thereupon specifically to found upon a term in that contract "which he has thus repudiated." And similarly in *Stevens*

(1) 1909 S. C. (H. L.) 53, 56.

v. *Timber and General Mutual Accident Insurance Association, Ld.* (1), Lord Romer, then Romer L.J., spoke of such an act as an attempt to approbate and reprobate. Whether the phrase "approbate and reprobate" is rightly used in this connection having regard to your Lordships' view as expressed in *Lissenden* v. *C.A.V. Bosch, Ld.* (2), I do not stay to consider. At most the party repudiating is not approbating and reprobating the contract, if that phrase be permitted, but only his future liabilities under it. The contract itself is still in existence and with it the arbitration clause. In these circumstances I do not see why even the wrongdoer should not apply to have the action stayed and succeed in his application unless the court in its discretion will not let him take advantage of a clause in a contract which he has refused to carry out. In this, I think, the right to insist on arbitration differs from the claim to require the further performance of the other terms and conditions of the contract. In respect of these latter the injured party may be excused from further performance after essential breach and acceptance of that breach as a renunciation of the contract: see *General Bill Posting Co., Ld.* v. *Atkinson* (3), a case in which a servant wrongfully dismissed was held no longer bound by a clause restricting his right to trade after the determination of his service. So far, however, as arbitration is concerned: "The "injured party must abide by the arbitration clause, for it "is severable and expressly inserted to deal with breaches, "including such breaches by repudiation." I quote from the notes to *Cutter* v. *Powell* (4) in 2 Smith's Leading Cases, 13th ed., at p. 37. As my noble and learned friend Lord Macmillan has said, the arbitration clause is inserted as a method of settling disputes and is not imposed as a term in favour of one party or the other. The same observations as apply to accepted repudiation apply, I think, to frustration. The phrase "frustration of the contract" is as inaccurate in expression as is the phrase "rescission of the contract by "repudiation." The contract is not frustrated. Its future performance, or the adventure, is frustrated. The damages are still at large and so is the question whether, having regard to the terms of the contract express or implied, there has been frustration or not. This appears to have been recognized in *Scott & Sons, Ld.* v. *Del Sel* (5), which, though a Scottish case, was decided on the same principles as apply in English law, and is binding on your Lordships' House. So far as *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (1), which is not binding, lays down a different principle, I do not think it should be followed despite the authority which it undoubtedly possesses.

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(1) 102 L. J. (K. B.) 337, 345.
(2) [1940] A. C. 412.
(3) [1909] A. C. 118.
(4) (1795) 6 T. R. 320.
(5) 1923 S. C. (H. L.) 37.

My Lords, the question of the effect of frustration on the arbitration clause differs to some degree from the effect of repudiation, but in essentials I doubt if there is any distinction. In the one as in the other the question whether future performance is excused is a matter for the arbitrator, dependent, indeed, in one view on the construction of the contract and the terms to be implied in it. I do not think it is an answer to say that the dispute arises after the contract is frustrated. It may, indeed it must do so, if frustration is alleged to have taken place and its occurrence is disputed. The dispute may, but the matter in dispute does not, arise after the contract is over—it is synchronous with the moment of its alleged ending, i.e., it arises at the moment at which it is rightly or wrongly contended frustration took place.

So far as concerns the other cases quoted which seem to conflict with this view, I agree with the Lord Chancellor in thinking that the true ground of the decision in *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* (2), was the narrowness of the field of submission and the fact that no dispute had arisen on the only point submitted to arbitration. The *Johannesburg* case (3) is rightly, I think, to be looked on as having been referred back to the Court of Session to exercise that discretion which they would not have had if the contract had been governed by Scottish law, but which they in fact had because it was an English contract. Moreover, its provisions were complex, containing no less than three arbitration clauses. The decision is explained on both these grounds in the later case of *Sanderson & Son* v. *Armour & Co., Ld.* (4). Apart from the argument based on discretion, which I have negatived, the only contention raised in the present case is that the contract had come to an end and with it the arbitration clause, or, at any rate, that the respondents have in some way repudiated the contract and, therefore, should not be permitted to rely on the arbitration clause contained in it. There is, I think, more than one

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(1) [1926] A. C. 497.
(2) [1915] A. C. 499.
(3) 1909 S. C. (H. L.) 53.
(4) 1922 S. C. (H. L.) 117.

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answer to this argument. (i.) I can see no ground for asserting that the respondents ever repudiated the contract. Rightly or wrongly, they thought themselves entitled to protection against claims by third parties, and, accordingly, stated in their letter of August 24, 1939, that they could only accept further orders on the strict understanding that from the amounts due a percentage must be retained to build up a reserve. A number of other disputes arose between the parties, but the letter of August 24 contained what the appellants claimed to be a repudiation of the contract. This letter, however, cannot be read alone. Business dealings and negotiations and disputes as to the rights of the parties under the contract continued after it, and, so far from showing an intention to repudiate the contract the respondents, as late as November 7 suggest either cancelling the contract altogether or entering into negotiations with a view to drawing up another. This is, not repudiation, but suggested variation of a contract recognized to be in existence even though the respondents may wrongly interpret its terms and their rights under it. (ii.) Even if I were wrong in this view the respondents would still, for the reasons which I have endeavoured to state above, be entitled to take advantage of the arbitration clause. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Nicholson, Graham & Jones.*
Solicitors for respondents: *Pennington & Son.*

[HOUSE OF LORDS.]

H. L. (E.)*

1941

Dec. 1, 4, 5, 8.

1942

Feb. 20.

COMMISSIONERS FOR GENERAL PURPOSES OF INCOME TAX FOR CITY OF LONDON . . . . . . APPELLANTS;

AND

GIBBS AND OTHERS . . . . RESPONDENTS.

Revenue—Income tax—Partnership—Taking of additional partner—Cesser of business of old partnership and succession thereto of new partnership—Adjustment of assessment—Income Tax Act, 1918

**Present:* VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD PORTER.

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Income Tax Commissioners for City of London v. Gibbs.

(8 & 9 *Geo.* 5, *c.* 40), *sch. D; Rules applicable to cases I. and II.*, *r.* 9, *sub-rr.* 1, 2.

By r. 9, sub-rr. 1 and 2, of the Rules applicable to cases I. and II. of sch. D to the Income Tax Act, 1918, if a person charged under sch. D ceases within the year of assessment to carry on the trade in respect of which the assessment is made and is succeeded by another person, the commissioners shall adjust the assessment as directed. A partnership of four stockbrokers took in a fifth partner, and thereafter continued to carry on business as stockbrokers:—

Held (Lord Russell of Killowen dissenting), that, although in English law a partnership is not a single juristic person, when the four partners took in a fifth partner, they ceased to carry on business and were succeeded by the partnership of five within the meaning of sub-r. 1, so that the Commissioners had jurisdiction under sub-r. 2, to adjust an assessment made on the partnership of four and charge the partnership of five with a fair proportion of the assessment from the time that partnership came into being.

Per Viscount Simon L.C. In construing a taxing statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities of taxation as between citizens of the two countries.

Decision of the Court of Appeal [1940] 2 K. B. 615 reversed.

Appeal from the Court of Appeal.

The facts as stated by Viscount Simon L.C. were as follows:

By a document dated November 5, 1937, the Commissioners for the General Purposes of Income Tax for the city of London gave notice to the stockbroking firm of Sir R. W. Carden & Co. of an assessment under sch. D for the year ending April 5, 1938. The assessment was in respect of the profits of the partnership, and by r. 10 of the Rules applicable to cases I. and II. under that schedule, the assessment was a joint assessment made in the partnership name, and the tax was "computed "and stated jointly and in one sum." The total figure on which tax was to be charged was fixed, in the ordinary way, on the profits made in the previous year 1936–7, and after adjustment was agreed at 69,355*l.* The firm of Sir R. W. Carden & Co., at the time when the assessment was made, consisted of four partners (hereinafter designated A, B, C and D), and this continued to be the composition of the firm on January 1, 1938, when the first half of the income tax resulting from the assessment became due. On February 7, 1938, however, the composition of the firm changed owing to the taking in of a fifth partner (hereinafter called E). On July 27, 1938, the inspector of taxes, purporting to act in accordance with r. 9, sub-r. 1, of cases I. and II. of sch. D, certified to the general commissioners particulars of the change which had taken place, and the commissioners thereupon purported to adjust the assessment by charging to the firm of five persons, out of the total assessment of 69,355*l.*, the apportioned amount of 11,078*l.*, with the result that the firm of four persons would be relieved of liability for tax on this latter figure, but would be left answerable for tax on the balance of 58,277*l.* As a matter of mathematical calculation there was no dispute that these figures are correct. They represented the fair apportionment of the total between that part of the year of assessment which lay before February 7, 1938, and that portion which remained from that date. The respondents, however, contended that no such apportionment under r. 9 could lawfully be made, since, according to them, the change during the year of assessment in the composition of the firm did not constitute a cesser in carrying on the trade by A, B, C and D, and the succession "by another person," namely, A, B, C, D and E in that trade. On January 17, 1940, they applied to a Divisional Court of the King's Bench Division for an order to prohibit the commissioners from adjusting under r. 9 the assessment made on them. On May 10, 1940, a Divisional Court, consisting of Hawke, Charles and Hilbery JJ., dismissed the application (1), but on August 2, 1940, the Court of Appeal (Scott, Clauson and Goddard L.JJ.) reversed this decision and directed that the order of prohibition should be made, taking the view, as Clauson L.J. expressed it (1), that "the condition precedent to the operation of r. 9, namely, "that a person has ceased to carry on a business and has been "succeeded therein by another person, is not fulfilled by the "circumstances of the case." The appellants appealed.

Sir Donald Somervell A.-G., *R. P. Hills* and *Scrimgeour* for the appellants.

King K.C. and *F. Grant* for the respondents.

The arguments appear sufficiently from the opinions delivered. The House took time for consideration.

1942. Feb. 20. VISCOUNT SIMON L.C. (read by Lord Russell of Killowen). My Lords, it may contribute to a just appreciation of the reality involved in this highly technical question if I set out what is the practical reason why the respondents challenge the Crown's right to proceed under r. 9. This was frankly stated to the Divisional Court by Mr. Grant when he applied for the rule and was further explained to this House by Mr. King. The actual profits of this stockbroking business made in the year 1937–8 were less than its profits in the preceding year by reference to which the total assessment was made. Just before the end of the fiscal year 1937–8, namely, on March 25, 1938, a sixth partner, who may be called F, was taken into the firm, and on April 1 all the partners joined, under the proviso to r. 11, sub-r. 1—which was first enacted by s. 32 of the Finance Act, 1926—in sending to the surveyor of taxes a signed notice claiming that, in consequence of this change in the partnership, income tax should be computed as if the trade had been discontinued on March 25 and a new trade had then been set up. The result of this would be that the old trade would be treated as coming to an end in the course of the fiscal year and the assessment in respect of this broken period would be based not on the greater profits of the year before, but on the actual profits of the final period. There would, however, also be a revision of the figure for the previous year. Similarly, if a new trade is to be deemed to be set up on March 25, 1938, income tax in respect of the opening period could not be ascertained by reference to past profits. Apart from these considerations, which may explain the action taken by the respondents, the Crown naturally wish to secure a final and authoritative interpretation of r. 9, especially in view of the difficulties which now arise from comparing it with r. 11.

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(1) [1940] 2 K. B. 242.

(1) [1940] 2 K B. 615, 629.

Rule 9 of the Rules applicable to cases I. and II. of sch. D to the Income Tax Act, 1918, runs as follows: "(1.) If a "person charged under this schedule ceases within the year "of assessment to carry on the trade, profession, or vocation "in respect of which the assessment is made, and is succeeded "therein by another person, the surveyor shall, within four "months from the fifth day of April next after any such "change, certify to the general commissioners for the division "in which the assessment is made the particulars thereof, and "the full name and residence of the person charged and of his "successor and the date of the change, if the same be known "to the surveyor. (2.) On receipt of the certificate the com"missioners shall cause notice to be given to the respective "persons of a meeting of the commissioners to consider it, "and after examination of the said persons, if they attend, "or on other satisfactory proof of the facts, the commissioners "shall adjust the assessment by charging the successor with "a fair proportion thereof from the time of his succeeding to "the trade, profession, or vocation, and relieving the person "originally charged from a like amount. (3.) The determination of the commissioners on any such certificate shall "be final, and the sum apportioned to each such person shall "be recoverable from him in like manner as if he had been "charged under the original assessment. (4.) If either of the "said persons has paid in respect of an assessment so certified "more than the proportion which appears by the determination "of the commissioners to be chargeable on him, the amount "overpaid shall, when recovered from the person liable, be paid "to the person by whom the overpayment was made."

The word "assessment" is used in our income tax code in more than one sense. Sometimes, by "assessment" is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax on it, but in another context the "assessment" may mean the actual sum in tax which the taxpayer is liable to pay on his profits. These two things are, of course, not the same, or, at any rate, will not become the same unless and until income tax is charged at the rate of 20*s.* in the pound. It is remarkable that these two separate meanings of the word "assessment" may occasionally be found within the bounds of a single section: for example, in r. 9, sub-rr. 1 and 2 appear to contemplate the splitting of the assessment in the first sense (and this is the practice that was followed when an assessment of 69,355*l.*, being the amount of profits assessed, was apportioned as above stated), whereas in sub-r. 3 the words "the sum apportioned "to each such person shall be recoverable from him" obviously mean the amount of tax due in respect of the apportioned fraction of profits. Rule 9 deals with the persistence of a trade, profession or vocation notwithstanding a change in the persons carrying it on. Such a situation cannot arise in the case of some professions or vocations, e.g., in that of a barrister or of a portrait painter. There are other branches of activity where the persistence of the same enterprise, notwithstanding a change of personnel, may be to some extent possible, e.g., on the sale of a country doctor's practice, and then there is the large and important class of an established business capable of transfer as a going concern. It may be worth observing, in passing, that the preservation of the identity and continuity of a business, notwithstanding a change in those who carry it on, is probably most completely illustrated by changes which may occur from time to time in a partnership firm.

The question in the present case is whether, if a stockbroker's business is carried on for part of the year by A, B, C and D in partnership and for the next part of the year by A, B, C, D, and E, this change can be described, within the meaning of r. 9, as a case in which a person charged "ceases" to carry on the trade and "is succeeded therein by another "person." It cannot be disputed that the language of the rule would apply if an individual, A, ceases to trade and is succeeded in the business by an individual, B, and the same result follows if a corporation, limited or unlimited, is substituted for A or B, or both. There would also be no difficulty in treating the rule as applying to the transfer of a business from a partnership consisting of A, B, C and D to another partnership consisting of W, X, Y and Z, for "person" includes "persons." The difficulty is to construe and apply the rule if the new partnership contains a member, or members, of the old. In the present case none of the former partners has retired, and the new combination is the result of an addition, but it seems to me—and indeed this is admitted by counsel for the respondents—that no distinction, in principle, can be drawn between this case and the case in which all the previous partners, except one, have retired and a large number of new partners are added. The crucial case always is one in which there is one individual at least who is a partner throughout.

If we were concerned with nothing more than the strict legal construction of r. 9 without regard to its setting in the income tax code, I should have no difficulty in agreeing with the view of the Court of Appeal. That view is crystallized in the closely reasoned judgment of Clauson L.J., insisting that it is not a partnership firm which carries on trade but its individual members who carry it on in partnership, and that the old partnership is not to be regarded as ceasing to carry on trade, and the new partnership is not to be regarded as succeeding, when members of the old partnership are also some of the members of the new and thus do not individually cease to carry on the trade at all. It seems to me, however, that, regarded in its historical setting, this interpretation of r. 9 involves difficulties which must be examined.

The scheme of income tax imposed under sch. D in respect of annual profits or gains arising in respect of any trade, etc., provides that the figure taken to represent profits in the year of assessment shall be arrived at by reference to the results of former trading (originally the average of profits of the three previous years, and now, under the Finance Act, 1926, the previous year's profits). It is obvious that this feature of the system, if not modified, might operate with special hardship in the event of a change in the composition of a partnership in the course of the year of assessment, and, indeed, in the case of any change in the personnel of those carrying on the business in the year for which the tax is being collected. In the case of a partnership, the tax is to be computed and stated jointly and in one sum, separately from any other income tax chargeable on any of the partners, and the joint assessment is to be made in the partnership name: r. 10 of cases I. and II. of sch. D of the Income Tax Act, 1918. The liability, therefore, is joint and, unless the income tax code provides some mitigation, the Crown would be entitled (though we are told this is not what in fact is ordinarily done) to demand the whole amount of tax from a new partner who has only joined towards the end of the year. Moreover, the very fact that there has been a change in the composition of the partnership during the year may, owing, for example, to the dropping out of a partner who has been chiefly instrumental in making the business a success, cause a fall in profits. Again, the same result might follow where the carrying on of a trade passes from a single individual to another individual, and this remains true if a corporation, limited or unlimited, is substituted for the individual in either or both cases.

In the Act of 1842, Parliament dealt with this situation in r. 4 of cases I. and II. of sch. D, contained in s. 100 of the Income Tax Act of that year. The rule is as follows: "Fourth.—If amongst any persons engaged in any trade, "manufacture, adventure, or concern, or in any profession, in "partnership together, any change shall take place in any such "partnership, either by death, or dissolution of partnership as "to all or any of the partners, or by admitting any other "partner therein, before the time of making the assessment, or "within the period for which the assessment ought to be made "under this Act, or if any person shall have succeeded to any "trade, manufacture, adventure, or concern, or any profession, "within such respective periods as aforesaid, the duty payable "in respect of such partnership, or any of such partners, or "any person succeeding to such profession, trade, manufacture, "adventure, or concern, shall be computed and ascertained "according to the profits and gains of such business derived "during the respective periods herein mentioned, notwithstanding such change therein or succession to such business "as aforesaid, unless such partners, or such person succeeding "to such business as aforesaid, shall prove, to the satisfaction "of the respective commissioners, that the profits and gains of "such business have fallen short or will fall short from some "specific cause, to be alleged to them, since such change or "succession took place, or by reason thereof." It will be observed that in this rule a "change" is regarded as taking place not only if some one or more members of a partnership drop out but also if there is a dissolution of partnership as to all the partners. Yet, if the partnership is completely dissolved and the trade goes on in new hands, this seems to involve a change which amounts to a succession. On the other hand, the rule goes on to speak of the case in which any person shall have "succeeded" to the trade, etc., and it is not easy to give a confident application to the phrase "such partners" which follows the word "unless," for there is no expressed antecedent to the word "such." Yet the reason of the thing strongly suggests that the partners who can secure relief by alleging a falling short of profits from a specific cause would be the partners who are left after the change has taken place. These obscurities would be more important if the Act of 1842 had not been repealed in 1918 and if the existing provisions on the subject were not differently expressed.

In 1880, a new and more effective method was adopted for providing against the hardship which might otherwise be suffered from a change in the carrying on of a concern during the year of assessment. The Taxes Management Act of that year is described in its full title and in its preamble as a consolidating Act, but in fact the provision under the head of "Changes" in s. 62 was new. The provision was in almost the same terms as the present r. 9, and provided that if a "person" ceases within the year of assessment to carry on the concern in respect of which the assessment is made and is succeeded therein by another "person," there shall be a splitting of the assessment by the commissioners so that the predecessor and the successor shall each be liable for a fair proportion of the resulting tax. The proof, therefore, that as the result of the change some specific cause had operated to reduce the profits was no longer necessary in the cases to which s. 62 applied for the purpose of getting an adjustment. Sect. 62 manifestly applied, and its substitute r. 9 now manifestly applies, to every case where a business during the year of assessment passes from the hand of one person or set of persons to another person or another completely different set of persons. The question is whether it applies in a case where the new set of persons is not completely different, because, though there is a change in the composition of the partnership, there is a common element of one or more partners in each combination.

I now turn to the Income Tax Act, 1918, where r. 9 is immediately followed by rr. 10 and 11. Rule 10 merely carries forward the provision for making a joint assessment in the partnership name in the case of a concern carried on by two or more persons jointly, and making it separately from any other assessment on the individuals who are partners. Rule 11 reproduced in substance r. 4 above set out as it was contained in the Act of 1842. The Finance Act, 1926, however, by s. 32, sub-s. 1, substituted in place of the former r. 11, the following language: "11 (1.) If at any time after April 5, 1928, a change "occurs in a partnership of persons engaged in any trade, "profession or vocation, by reason of retirement or death, or "the dissolution of the partnership as to one or more of the "partners, or the admission of a new partner, in such cir-"cumstances that one or more of the persons who until that "time were engaged in the trade, profession or vocation "continue to be engaged therein, or a person who until that "time was engaged in any trade, profession or vocation on his "own account continues to be engaged in it, but as a partner "in a partnership, the tax payable by the person or persons "who carry on the trade, profession or vocation after that time "shall, notwithstanding the change, be computed according "to the profits or gains of the trade, profession or vocation "during the period prescribed by the Income Tax Acts: "Provided that, where all the persons who were engaged in "the trade, profession or vocation both immediately before "and immediately after the change require, by notice signed "by all of them or, in the case of a deceased person, by his "legal representatives, and sent to the surveyor within three "months after the change took place, that the tax payable for "all years of assessment shall be computed as if the trade, "profession or vocation had been discontinued at the date of "the change, and a new trade, profession or vocation had been "then set up or commenced, and that the tax so computed "for any year shall be charged on and paid by such of them as "would have been charged if such discontinuance and setting "up or commencement had actually taken place, the tax shall "be computed, charged, collected and paid accordingly. "(2.) If at any time after the said fifth day of April any person "succeeds to any trade, profession, or vocation which until "that time was carried on by another person and the case "is not one to which paragraph (1.) of this rule applies, the tax "payable for all years of assessment by the person succeeding "as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the "tax payable for all years of assessment by the person who "until that time carried on the trade, profession or vocation "shall be computed as if it had then been discontinued. "In this paragraph references to a person include references "to a partnership. (3.) In the case of the death of a person "who, if he had not died, would, under the provisions of this "rule, have become chargeable to income tax for any year, "the tax which would have been so chargeable shall be assessed "and charged upon his executors or administrators, and shall "be a debt due from and payable out of his estate."

Reading r. 9, r. 10 and the amended r. 11 together, a puzzle is disclosed to which, as it seems to me, no entirely satisfactory solution can be found. One effect of sub-r. 2 of r. 11 is that, if there is a complete change in the persons or person carrying on the trade during the year of assessment, the tax in respect of the trade carried on down to the change shall be computed as if the trade had then been discontinued, i.e. the actual profit in the broken period is the basis of tax, with the possibility of consequential adjustments in respect of the previous completed year, and the trade as from the date of the change shall be treated as the setting up of a new trade from that date. Consequently, r. 9 is no longer needed and can have no operation in such cases. To what then can r. 9 have any application, unless it be when there is a change in the composition of the partnership during the year of assessment, such that there is not a complete substitution of new partners for old, but some partner or partners remain in the partnership throughout ? It was pointed out during the argument that the amended r. 11, though enacted in 1926, did not operate until two years later, and, therefore, there was a field in which

r. 9 could apply to complete changes in personnel during the intervening two years. That is true, but this only amounts to saying that the difficulty in finding any usefulness in r. 9 did not arise till two years later. Certainly, we cannot attribute to the legislature the mistake, as Clauson L.J. is inclined to do (1) of overlooking the fact that r. 9 was useless, for s. 35 of the Finance Act, 1926, contains a reference to the power of the commissioners to adjust the assessment under that very rule. In the case of a provision in the Finance Act, in connection with which there is an annual review for purposes of amendment in every session of the House of Commons, I find it very difficult to suppose that the existence of r. 9 as part of the existing code has been forgotten, or that it would be deliberately left, year after year, as a piece of dead wood without any possible usefulness or effect in the ramifications of the ever-spreading income tax tree.

There is indeed another indication that Parliament regards the transfer of a business from one partnership to another as a "succession," even though some of the partners remain in the firm throughout. Sub-r. 2 of r. 11, in which it is expressly stated that references to a person include references to a partnership, provides that, if after April 5, 1928, any person succeeds to any trade which until that time was carried on by another person and the case is not one to which para. 1 of the rule applies, tax shall be calculated as though there had been the discontinuance of one trade and the commencement of another. But what is the case to which para. 1 of the rule applies? It is the very case under discussion, where there is a persistence of certain partners while other partners have changed. This, then, assumes that such a change in partnership amounts, in the language of the income tax code, to a succession. Moreover, if r. 9 is not left to operate in the only case conceivably remaining for its operation, this curious result follows. If there is a change in a partnership such as is described in para. 1 of r. 11, and if all the partners old and new combine to give the notice therein referred to, then there will follow a division of responsibility for the tax, the old partners being liable on the basis that the trade was discontinued at the date of the change, and the new combination being liable for a new trade thenceforward. But what happens if the whole body of partners do not make this unanimous

(1) [1940] 2 K. B. 615, 628.

application, perhaps because one of them objects to do so, or because it is not in their interest to do so? If r. 9 has no application in such a case, then as above pointed out, the Crown could call on a single partner, even one who had only joined the firm at the time of the change, to pay the whole tax. This, to say the least of it, appears to be quite contrary to the trend of the efforts which the legislature has made for a century past to limit the rights of the Crown in this respect. It would be very extraordinary if the legislature, while enacting in r. 11, sub-r. 1, what would happen on the hypothesis that all the partners agreed to act together, has never asked itself what would happen if all the partners did not so agree. Construing this bundle of rules as a whole, I feel forced to the conclusion that it was the intention of the legislature to leave r. 9 to apply in such a case. It was suggested by Mr. King, in his persuasive argument for the respondents, that r. 9 and r. 11 could not live together, but I do not think that this is so. If we imagine a case in which the profits of the trade actually made in the year of assessment greatly exceed the assessed profits derived from the past, it might not at all suit the partners to make use of sub-r. 1 of r. 11, for they would thereby bring on themselves much heavier claims for tax at once. In such a case the partners would much prefer to have the smaller total divided by the machinery of r. 9.

I concede without any doubt or qualification the proposition relating to the English law of partnership on which the judgment of the Court of Appeal is largely based. Strictly speaking, it is certainly true that an old partnership cannot be regarded as "ceasing" to carry on the trade, and the new partnership cannot be regarded as "succeeding" to it when some members of the old partnership are also members of the new, and thus do not individually cease to carry on the trade at all. A, B, C and D are carrying on the trade throughout the year. How, then, can it be said that they, or any of them, have in the course of the year ceased to carry it on? If language is accurately used, a partnership firm does not carry on a trade at all. It is the individuals in the firm who carry on the trade in partnership. It is not the firm which is liable to income tax. The individuals composing the firm are so liable, though by r. 10 when a trade is carried on by two or more persons jointly the tax is computed and stated jointly and in one sum and is separate and distinct from any other tax chargeable to those

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persons or any of them, and a joint assessment shall be made in the partnership name. If, therefore (it is argued), r. 9 is applied to a partnership, it applies not because a partnership is "a person charged under this schedule," but because the singular includes the plural, and instead of a single person the case is one of a number of persons who are jointly so charged. So far as English law is concerned, it is indisputable that a partnership firm is not a single persona, though a different view obtains in Scotland, and in construing a taxing statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the two countries. Lord Halsbury L.C. affirmed this principle in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), when he adopted the canon of construction laid down by the Court of Session in *Baird's Trustees* v. *Lord Advocate* (2), and quoted the general principle of common sense which Grose J. laid down in a rating case (*R.* v. *Hogg* (3)): "an universal law . . . . cannot receive different "constructions in different towns." Lord Watson in *Pemsel's* case (4) deduces from the Scottish decision of *Lord Saltoun* v. *Lord Advocate* (5) the principle, which he there applies, that the Income Tax Act, 1842, must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries.

It is these considerations which have made it necessary for me to look further into the statutory history and possible application of r. 9, not because I have any doubt of the correctness of the proposition of English law as to the nature of a partnership firm, but because our duty in construing a statute such as this is to find out what the legislature must be taken to have really meant by the expressions which it has used, without necessarily attributing to the legislature a precise appreciation of the technical appropriateness of its language. "The more literal construction ought not to prevail," said Lord Selborne L.C. in *Caledonian Railway Co.* v. *North British Railway Co.* (6), "if . . . . it is opposed to the intentions of "the legislature, as apparent by the statute, and if the words "are sufficiently flexible to admit of some other construction

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(1) [1891] A. C. 531, 548.
(2) (1888) 15 R. 682.
(3) (1787) 1 T. R. 721, 728.
(4) [1891] A. C. 531, 557.
(5) (1860) 3 Macq. 659.
(6) (1881) 6 A. C. 114, 122.

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"by which that intention will be better effectuated." As a strict proposition of English law, there is no doubt at all that a partnership is not, as such, a single juristic person. As Farwell L.J. said in *Sadler* v. *Whiteman* (1): "In English "law a firm, as such, has no existence; partners carry on "business both as principals and as agents for each other "within the scope of the partnership business; the firm name "is a mere expression, not a legal entity, although for convenience under Order 48A it may be used for the sake of "suing and being sued." And again: "It is not correct to "say that a firm carries on business; the members of the "firm carry on business in partnership under the name or "style of the firm."

In the end, the House has to choose between two views, neither of which is entirely satisfactory. But, for the reasons I have given, I think that we must in this case be prepared to construe the rule under discussion in a popular rather than in a technical sense, and I am not greatly shocked to find that, when dealing with a joint assessment of trade carried on by a partnership, the legislature has proceeded on the view that when the trade was first carried on by A, B, C and D in partnership and was subsequently carried on by A, X, Y and Z, in partnership, this is to be regarded as though the first partnership ceased and the second partnership succeeded to the first. At the same time, this result, though, in my opinion preferable to treating r. 9 as obsolete lumber, is only reached by giving to the rule an application which is difficult to reconcile with the aptest use of legal terminology, and it is to be hoped that Parliament, in a future Finance Act, may by the use of amending language think fit to illuminate the obscurity in which the judiciary for the time being has to grope.

In my view, therefore, this appeal should be allowed. I must point out, however, that, in substance, the respondents do not appear to lose anything by this reversal. The claim made on April 1, 1938, under the proviso to r. 11, sub-r. 1, remains valid, with the consequences that the business carried on down to March 25 must be regarded as discontinued at that date and a new trade must be regarded as having been set up thenceforward. In the circumstances, I think that there should be no costs in this House. The decision of the Court of Appeal except as to costs should be reversed, but

(1) [1910] 1 K. B. 868, 889.

its order as to costs must stand, as this was the agreement when leave to appeal to this House was given.

Lord Russell of Killowen. My Lords, one question only arises on this appeal, namely, the true meaning and construction of the language employed in r. 9 of the Rules of cases I. and II. of sch. D to the Income Tax Act, 1918. The particular question is, does that rule apply where the change is of this nature, namely, where a partnership consisting of four individuals takes in, during the year of assessment, a fifth partner, with the result that a business is carried on during one part of the year by four individuals in partnership and during the remaining part of the year by those four individuals and a fifth person in partnership. That is the precise question which arises in regard to the facts of the present case, but in the argument on construction the broader question is involved, whether the rule applies to any case in which after such a change one or more of the members of the old partnership continue to carry on the business as members of the new partnership. I am using the word "business" so as conveniently to cover "trade, profession or "vocation."

In my opinion the language of the rule, interpreted according to the ordinary meaning of the words used, admits of no doubt. It does not apply to such a case. Rule 9 does not, in terms, refer to partnerships as such at all. Partnerships as such are dealt with by rr. 10, 11 and 12. The word "person," in the singular in r. 9 could not, of its own force, include a partnership of two or more persons. Businesses carried on in partnership can only come within the purview of r. 9 by reason of the Interpretation Act, 1889, s. 1, sub-s. 1 (*b*) and s. 19, which enables the singular word "person" to be read as including the plural "persons"; for businesses carried on in partnership are carried on by the individuals who are in partnership, and not by the partnership firm as a separate conception. The firm name is a mere expression to denote the individuals. Read in the light of the Interpretation Act the rule comes into operation upon, but only upon, the following hypothesis—(I omit words immaterial for this purpose)—"If a person or persons . . . . ceases or cease within the "year of assessment to carry on the trade . . . . in respect "of which the assessment is made, and is or are succeeded "therein by another person or other persons." As I read it, that hypothesis, according to its plain meaning, postulates that there shall be at a point of time a ceasing to carry on by a person or persons, and a commencement to carry on by other, i.e., different person or persons. In other words, the language used contemplates only the case of an owner or owners of a business ceasing to carry it on, and a different owner or owners commencing to carry it on within the year of assessment.

In coming to this conclusion I rely simply on the language of r. 9, sub-r. 1, without any reference to its pedigree, or to the history of income tax legislation. If, however, reference is made to this history it becomes abundantly clear that two conceptions have always (since 1842) been distinguished and dealt with separately, namely, (1.) changes in partnerships, and (2.) successions to businesses. I do not think it necessary to explore this history in detail. It has been done by Clauson L.J. in his judgment, and, as he pointed out, had this case arisen before the new r. 11 had come into operation, it must have been dealt with under the old r. 11 and could not have been dealt with under r. 9. If this view be right, and it is, in my opinion, obviously right, the case cannot, after the alteration of r. 11, fall under r. 9, unless, notwithstanding that the language of r. 9 remains unaltered, the meaning of the words used in it has undergone some change. I feel unable myself to assent to the suggestion that the legislature has in this way not merely enacted a new r. 11, but has also in some way, I suppose by necessary implication, enacted that a new meaning shall attach to the language of r. 9. Nor do I rely on the difficulty of fitting in the mandatory provisions of sub-rr. 2 and 3 of r. 9, with the provisions of the new r. 11. These matters, however, help to corroborate what I take to be the plain meaning of the language used in r. 9.

My Lords, I heard arguments on behalf of the appellants which purported to show that the construction for which they contended was a useful one from the point of view of the tax authorities or a beneficial one to the taxpayer, or was one which was in accordance with the view which had prevailed in official circles. But I heard no argument on construction which did not appear to me irreconcilable with the plain meaning of the words under consideration. Rule 9 became, in my opinion, a spent force when the new r. 11 came into operation. There is no longer any case to which it can apply.

I have stated in my own words my views on this question of construction, but I am not conscious of having added anything to the judgment of Clauson L.J. which, in my opinion, is unanswerable.

LORD MACMILLAN. My Lords, the question for decision is whether r. 9 of the Rules applicable to cases I. and II. of sch. D to the Income Tax Act, 1918, applies to the circumstances of the present case. That rule provides that if "a "person charged" under sch. D "ceases within the year "of assessment to carry on the trade, profession or vocation "in respect of which the assessment is made, and is succeeded "therein by another person" then certain procedure shall be set in motion "within four months from the 5th day of April "next after any such change," having for its object and effect an adjustment by the general commissioners of the assessment "by charging the successor with a fair proportion thereof "from the time of his succeeding to the trade, profession or "vocation and relieving the person originally charged from a "like amount." The determination of the general commissioners is to be final and "the sum apportioned to each "such person shall be recoverable from him in like manner "as if he had been charged under the original assessment."

It was common ground that if r. 9 does not apply to the circumstances of the present case there is no other provision in the income tax statutes for the apportionment of liability for the total tax payable under the assessment for the year 1937–38, and the new partner in a question with the Crown must remain under liability for the whole amount of the tax jointly with the original partners, although he participated for less than two months in the year 1937–38 in the carrying on of the business. It was also common ground that if r. 9 does not apply to such a case as the present it has no application to any case and is entirely inoperative. These considerations are argumentatively impressive and ought not to be left out of account, but the real question is whether the present case falls within the language of r. 9 when soundly construed. I propose, therefore, to begin by examining the terms of r. 9 as it stands by itself, apart from its history.

In order that the rule may be applicable there must first of all be "a person charged." The word "person" is in the singular, but it includes the plural and also any body of persons corporate or unincorporate: Interpretation Act, 1889, s. 1, sub-s. 1 (*b*), and s. 19. In considering whether a partnership or a group of persons associated in partnership constitutes "a person charged" within the meaning of the rule, I think it right to lay aside any preconceptions derived either from the law of England or from the law of Scotland as to the technical legal nature of a partnership. In Scotland a firm is "a legal person distinct from the partners of whom it is "composed": Partnership Act, 1890, s. 4, sub-s. 2, but this is not so under English law. For the present purpose this distinction should, in my opinion, be disregarded. The Income Tax Acts are Imperial statutes equally applicable on both sides of the border and the language which they employ ought to be construed so as to have, as far as possible, uniform effect in England and in Scotland alike: *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), per Lord Halsbury L.C. The important thing to ascertain is the meaning of the word "person" in the vocabulary of the Income Tax Acts. The word constantly occurs throughout the Acts, and I think that it is most generally used to denote what may be termed an entity of assessment, i.e., the possessor or recipient of an income which the Acts require to be separately assessed for tax purposes. Now r. 10 provides that "where "a trade or profession is carried on by two or more persons "jointly the tax in respect thereof shall be computed and "stated jointly and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or "any of them and a joint assessment shall be made in the "partnership name." The profits of a business carried on by a partnership are thus treated as a separate subject of assessment and the assessment is made in the partnership name. The personification of partnerships is even more manifest in r. 12, by which in certain circumstances a "partnership shall "be deemed to reside outside the United Kingdom notwithstanding the fact that some of the members of the said "partnership are resident in the United Kingdom." That rule uses the expressions "the trade or business of a partnership firm," "the said firm shall be chargeable," "an assessment may be made on the said firm in respect of the said "profits in the name of any partner resident in the United "Kingdom." Justification is thus not wanting for the view expressed by Romer L.J. that for taxing purposes "a partnership firm is treated as an entity distinct from the persons "who constitute the firm": *Watson and Everitt* v. *Blunden* (2). Having regard to the special vocabulary of the income tax

(1) [1891] A. C. 531, 548. (2) (1933) 18 Tax Cas. 402, 409.

legislation, I find no difficulty in interpreting the words "a "person charged" in r. 9 to include the case of several persons associated together in partnership for the purpose of carrying on a trade in common whose profits are by the Acts made the subject of separate assessment and separate charge.

But in order that r. 9 may apply it is necessary next that there should be a "change" in the year of charge in consequence of which one person "ceases" to carry on the trade and is "succeeded" by another person. Both Scott and Clauson L.JJ. find it unnatural to describe in these terms what has happened in the present instance. Scott L.J. says (1): "I do not think that it is a natural use of language "to say that a firm ceases to carry on its business and that "another firm succeeds to the business, when all that happens "is, for instance, that a young managing clerk has become a "very junior partner with a tiny percentage of the firm's "profits added to his salary." Clauson L.J. puts it thus (2): "The four original partners do not cease to carry on the "trade: they continue to carry it on with the co-operation "of a fifth person. That person in no sense succeeds to the "trade: he joins in carrying on the trade." With all respect, I am not convinced of the soundness of this reasoning. It is not a question whether the four original partners cease individually to be engaged in the business or the new partner as an individual succeeds to the business. There has, undoubtedly, been a change in the person charged, as I construe this expression. The trade has ceased to be carried on by four persons in partnership and has become a trade carried on by five persons in partnership. Whereas four persons were jointly chargeable, there are now five persons jointly chargeable by reason of the change in the "person charged." It does not seem forced to say of this change that four persons jointly have ceased to carry on the trade and that five persons jointly have succeeded to it. I agree with Scott L.J. that, the Attorney-General's contention being one of law, it is fair to test it by an extreme case. Let it then be supposed, to take a case at the opposite extreme, that what has happened is that in the case of a business carried on originally by four partners, A, B, C and D, three new partners E, F and G are assumed and A, B and C resign. It seems quite natural in such a case to say that A, B, C and D have ceased to carry on the business and have been succeeded by D, E, F and G,

(1) [1940] 2 K. B. 615, 620. (2) Ibid. 624.

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although D has throughout had a share, possibly different shares, in carrying on the business. In ordinary parlance one firm would be said to have succeeded to another. B, C and D have certainly ceased to share in carrying it on; E, F and G have certainly succeeded to shares in it.

That the terminology of r. 9 is not inapt to describe what happens when a change in the persons constituting a partnership takes place is illustrated in *Brace* v. *Calder* (1). That was the case of a firm composed originally of four partners. Two of them retired and the business was continued by the two remaining partners. An employee of the original firm declined to serve the two continuing partners and was held entitled to nominal damages for wrongful dismissal. I am concerned not with the soundness of the decision but with the language judicially employed. Lord Esher M.R. (2) thus described what had happened: " What they did was to "alter the constitution of the firm. The old firm ceased to "carry on its business and the business became that of the "new firm. For the present purpose it is just the same as if "the firm had simply ceased to carry on business." Lord Esher was a dissentient from the decision, but that does not affect the passage which I have quoted, for his colleagues in the majority said much the same. Thus Rigby L.J. said (3) that " the partnership between the four defendants was put "an end to and the business transferred to two of them, who "continued to carry on a business under the same firm name," and Lopes L.J. used similar language. So if the draftsman of r. 9 intended to include the case of a change in the composition of a firm, but used language inapt for the purpose, he at least erred in good company. I should add that it was agreed on all hands that the language of r. 9 would cover a case in which a firm composed of one set of partners transferred its business to another firm composed of entirely different partners.

Taking r. 9, then, as it stands, I should be of opinion that the present case falls within it. But I must turn now to the history and the context of the rule, which the learned lords justices have closely examined and on which their contrary conclusion is largely based. The tax under sch. D extends to " every trade carried on in the United Kingdom or else- "where," with one specific exception. The rules prescribe how the profits or gains of the trade are to be computed, but

(1) [1895] 2 Q. B. 253.
(2) Ibid. 258.
(3) Ibid. 262.

a trade does not pay taxes. Persons do. Therefore, the tax is charged on and levied from the persons carrying on the trade in respect of the profits or gains arising or accruing to them therefrom, computed in the manner directed. In the case of a trade carried on continuously by the same person or persons from year to year no difficulty as regards either computation or charge arises, but there are various special cases to be considered. Thus, (*a*) a trade may be begun or set up for the first time within the year or years forming the basis of assessment or within the year of assessment itself; (*b*) a trade may entirely come to an end in the course of the year of assessment; (*c*) a trade may be carried on continuously, but there may be changes in the persons conducting it. Such cases present difficulties both of computation and of charge. Special provision was made for (*a*), new trades, in the Act of 1842, sch. D, case I., r. 1; in the Act of 1918, sch. D, rr. 1, sub-r. 2, and r. 8, sub-r. 1, applicable to cases I. and II.; and in the Act of 1926, s. 29, sub-s. 1. For (*b*), discontinued trades, provision was made in the Act of 1842, s. 134; in the Act of 1918, sch. D, r. 8, sub-r. 2, applicable to cases I. and II.; and in the Act of 1926, s. 31, sub-s. 1. It is not necessary to say anything more about these special provisions relating to the commencement and the discontinuance of a trade, for they do not apply directly to the case in hand, which is an example of my class (*c*), that is, where a trade has been continuous, but there have been alterations in the persons carrying it on.

A survey of the legislation applicable to continuing businesses discloses two main features. First, as regards computation, a consistent disregard (down at least to 1926) of changes of personnel, the object being to secure that the whole profits of the trade, by whomsoever carried on, shall be duly taxed. Second, as regards charge, inasmuch as the tax once computed has to be recovered from "persons," a progressive recognition of the propriety of apportioning liability where different persons have been concerned in the making of the profits brought into charge. The Act of 1842 showed little compunction in the matter. Rule 4 of the Rules applicable to cases I. and II. of sch. D provided that if among any persons engaged in any trade in partnership together any change shall take place "either by death or dissolution of partnership "as to all or any of the partners or by admitting any other "partner," or "if any person shall have succeeded to any

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"trade," within the relevant periods, the duty payable in respect of such partnership or any person succeeding shall be computed irrespective of such changes therein or succession to such business unless such partners or such person succeeding are able to prove that since such change or succession took place or by reason thereof there was a falling off in profits or gains from some specific cause. Sect. 134 also dealt with the case where a person "succeeded" to the trade or business of another person and imposed on such person "so succeeding" liability for the full duties without any new assessment unless he could show a falling off of profits due to some specific cause.

It is noteworthy that in 1842 r. 4, which I have above summarized, makes provision for the computation of the duty in two cases: (*a*) the case of a change among the persons carrying on a trade in partnership, including a change as to "all" the partners, and (*b*) the case of a person succeeding to a trade. The classification is not very logical, for where there has been a change in all the partners there would seem clearly to be a succession. Then, in s. 134, which is concerned with liability to charge, the Act deals with persons ceasing to carry on a trade and being succeeded by other persons, but says nothing expressly about partnership changes. Perhaps this may have been because r. 3 had already made provision for all partners being charged jointly, though it would seem that if an assessment made on four partners jointly was to affect five partners jointly, an enactment providing that this should be so without any new assessment would have been appropriate, if s. 134 did not cover such a case. In 1880 the Taxes Management Act of that year in s. 62 made provision for the first time, in terms almost identical with those of the present r. 9, for the apportionment of the charge of tax in the case of a person ceasing to carry on a trade and being succeeded therein by another person. The section is comprehensively headed with the word "Changes" and refers to such a case as a "change in the carrying on of the "concern."

Now it is said, and fairly said, that in endeavouring to ascertain the true import of the present r. 9 it is relevant to consider how the case now before the House would have stood after the coming into force of the Act of 1880, containing as it did the progenitor of r. 9, but without the present r. 11. The draftsman of s. 62 of the Act of 1880, it is suggested, with the provisions of r. 4 of the Act of 1842 before him, deliberately elected to deal with one only of the two cases covered by that rule, namely, the case of a person ceasing to carry on a business and being succeeded in it by another person, and deliberately refrained from dealing with the other case also covered by that rule, namely, the case of a change among the persons engaged in a trade in partnership. The conclusion is sought to be drawn that s. 62 of the Act of 1880, and so the present r. 9, cannot have been intended to apply to a change in the personnel of a partnership. This is a formidable logical argument, but it is not in my opinion conclusive. The scheme of legislation in the matter in hand has been far from logical. It has been a case of makeshift patches by different hands, and verbal consistency is the last virtue that can be attributed to a code which uses so vital a term as " assessment " in no less than eight differing senses. (Report of Committee on Income Tax Codification, 1936, Cmd. 5131, para. 31.) Indeed, Lord Wrenbury, in *Kensington Income Tax Commissioners* v. *Aramayo* (1), went so far as to say that " no reliance can be placed upon an assumption of "accuracy in the use of language in these Acts." Sect. 62 of the Act of 1880 does not profess to be an amendment of the previous law. It is a new departure, and I have offered reasons to show that its language (repeated in r. 9) may fairly be held to cover the case of changes in the persons carrying on a partnership concern. The draftsman of s. 62 may have taken that view and have regarded a change in partnership personnel as a ceasing by one set of persons to carry it on and a succeeding to it of another set of persons, notwithstanding, or perhaps without due regard to, the distinction drawn in the fourth rule of the Act of 1842.

The next stage is reached in 1918 when the consolidation Act was passed. With minor alterations, it reproduced as r. 9 applicable to cases I. and II. of sch. D the provisions of s. 62 of the Act of 1880 and it reproduced as r. 11 the provisions of r. 4 in the Act of 1842. Being a consolidation statute it made no attempt to reconcile rr. 9 and 11 or to bridge the gap (if there was one) which, according to the respondents, left partnership changes with no machinery for apportionment. The distinction drawn in 1842 between partnership changes and successions may have been brought into more prominence by the new juxtaposition of rr. 9 and 11,

(1) [1916] 1 A. C. 215, 228.

but the law remained as it was after 1880, and if s. 62 of the Act of 1880 was intended to cover changes in partnership personnel, the Act of 1918 did not alter the position. Finally, in the progressive development of the law, came s. 32 of the Finance Act, 1926, which substituted for the previous r. 11 an entirely new rule. It introduced a new refinement by recognizing explicitly in sub-r. 1 for the first time that, in the case of a continuing trade, changes in the persons carrying it on in partnership might occur which left one or more of the persons who previously carried it on still engaged in it though in a new association. In such a case the rule reasserts the principle of the Act of 1842 that the computation of the profits of the trade shall remain unaffected by the change in personnel. Nothing is said about apportionment. There is a proviso, however, to the effect that all concerned may by notice within three months (subsequently altered to twelve months) after the change require the surveyor to treat the case as one of a discontinuance of one trade and the commencement of another and to charge the tax on the several parties as if there had been an actual discontinuance and commencement. The proviso has quite a different effect from what is directed to be done under r. 9. That rule apportions the assessment computed for the whole year among the different persons who carried on the trade during the year. The proviso to r. 11 requires two separate computations, one applicable to the notionally discontinued trade, the other applicable to the trade notionally commenced. Then in sub-r. 2 the new rule goes on to deal with the case where a person " succeeds " to a trade previously carried on by another person, " and the "case is not one to which para. 1 of this rule applies." In such a case the tax payable is to be computed as if at the time of the change the predecessor had discontinued the trade and the successor had commenced it. It is expressly provided that in this paragraph references to a person include references to a partnership. Sect. 35, sub-s. 1, of the Act of 1926 provides (inter alia) that where in the case of any profits or gains chargeable under cases I. and II. of sch. D it is necessary to effect an apportionment thereof to specific periods it shall be lawful to make such an apportionment : " Provided that "nothing in this section shall be construed as limiting the "power of the general commissioners with respect to the "adjustment of an assessment under r. 9 of the Rules applicable "to cases I. and II. of sch. D." The provisions of part IV.

of the Act of 1926 (which includes ss. 32 and 35) are by s. 37 to come into operation on April 6, 1927, till which time the existing enactments are to continue to have effect. Thereafter, any provisions inconsistent with part IV. are to cease to have effect.

Having examined the history of r. 9 and set out its context, I now return to the question of the interpretation of the rule with such light as my investigation has afforded. I cannot say that it has afforded much. But one thing is clear, namely, that the existence of r. 9 was not overlooked when the new r. 11 was introduced and that there was no inadvertent omission to repeal it, as suggested by Clauson L.J., whose attention was apparently not drawn to s. 35 of the Act of 1926. The operation of r. 9 was not safeguarded merely for the time intervening till the Act of 1926 came into effect. That would have been secured by the general saving in s. 37. Accordingly, in the view of the draftsman of the new r. 11, r. 9 had still a part to play. It may be that he misconstrued the effect of r. 9, as Clauson L.J. alternatively suggests, but that does not afford an escape from the fact that Parliament has reaffirmed r. 9 as part of the existing code and must be presumed to have intended that it should have some effect. In view of r. 11 the only case left in which it can operate is the case where there has been a change in the personnel of a partnership with a common element continuing and where no notice has been given to the surveyor under the proviso to sub-r. 1 of r. 11. I agree with Clauson L.J. (1) that that by itself would be " a very poor ground for giving an entirely "unnatural meaning to reasonably plain words," but it is not a circumstance to be disregarded if the words may be reasonably read in a sense which would not only render r. 9 an effective part of the code but also supply means of apportionment of tax in a case otherwise not covered.

It will have been observed that sub-r. 2 of the new r. 11, which deals with succession to a trade, is to be applicable only if " the case is not one to which para. 1 of this rule "applies," which deals with changes in partnership personnel. If in the income tax vocabulary a partnership change is never regarded as a succession it was superfluous to except from the operation of sub-r. 2 cases falling within sub-r. 1. This time logic tells in favour of the Attorney-General's interpretation of r. 9. If the excepting words were introduced ob majorem

(1) [1940] 2 K. B. 615, 628.

cautelam, it was surely an excessive precaution to except a case which could only on an entirely unnatural reading of sub-r. 1 be thought to be included.

After this long and tedious marshalling of all the relevant considerations I have now to come to a decision, and my decision is that the arguments in favour of the applicability of r. 9 to the case in hand ought to prevail. I cannot, however, take leave of the case without expressing my regret that so much time and money has had to be spent in unravelling a tangle which could easily have been straightened out by the revenue authorities in one of their annual applications to the legislature and my hope that an early opportunity will be taken of doing so. My vote is in favour of allowing the appeal and restoring the order of the Divisional Court.

Lord Wright. My Lords, I have had the advantage of reading in print the opinion just delivered of my noble and learned friend, the Lord Chancellor. I agree with it and only add a few words of my own to explain my position out of respect to the distinguished lawyers in the Court of Appeal and in this House who take a different view.

The difficulties in deciding this case result from the extreme parsimony in language practised by the legislature in formulating r. 9 of the Rules applicable to cases I. and II. of sch. D in the Act of 1918. I confess that for some time I was impressed by the close logic of Clauson L.J., who, agreeing with Scott L.J., has proceeded on the narrow interpretation of the words of the rule. The material words of r. 9 are: "If a person charged under this schedule ceases within the year "of assessment to carry on the trade, profession or vocation "in respect of which the assessment is made and is succeeded "therein by another person . . . ." That is the condition on which the machinery provided by the rule in order to secure a fair apportionment of the tax between the former person and the successor is to operate. This certainly seems simple enough. It appears to contemplate merely a transfer of the undertaking from one person to another. Before this provision was introduced by s. 62 of the Taxes Management Act, 1880, which was headed " Changes " and was substantially identical with the present r. 9, there was nothing to mitigate the effect of the provision now embodied in r. 11, which replaced the corresponding provision of s. 100 of the Act of 1842. Notwithstanding the change it was there enacted that there was to be only one assessment for the year and only a limited right to claim a reduction of the assessment was given to the successor in the event of there being a reduction of profits consequent on the change. But the position is not quite so simple. It is a familiar rule of construction that the singular includes the plural. Hence r. 9 is to be read in law as signifying "if a person or persons ceases or cease" and "is "or are succeeded by another person or other persons," etc. If persons carry on a business they do so jointly, and thus the idea of partnership is introduced. Where several persons jointly carry on business some may retire and others take their place, or a new partner may be admitted by the old partners without any other change in the firm. These and similar questions were, it is clear, present to the minds of the framers of the Act, because r. 11 provides for a change in a partnership "by reason of death or of dissolution of the "partnership as to one or more of the partners or the "admission of a new partner." It also provides for a case where a person succeeds to a trade or profession which, on ordinary principles of interpretation, includes a case where several persons succeed. Rule 11 provides that in all these cases the tax is to be computed as if there had been no change or succession "notwithstanding the change or succession." Under r. 10 where there is a partnership the tax is to be computed jointly and in one sum and a joint assessment is to be made in the partnership name, which means that any partner can be called on to pay the whole. This rule shows that while the revenue Acts do not deal specifically with partnerships (save exceptionally as in s. 32, sub-s. 2, of the Finance Act, 1926), they do in some respects treat them in a sense as special entities for taxation, though it is still true that the partners, not the firm as an entity, are taxed. The result is that where a new partner is admitted under r. 11, say at whatever period of the year, he is liable in solido to income tax for the whole assessment, which is a single assessment on the profits of the entire year before the new partner joined the firm, though, no doubt, the old and new partners may provide for some adjustment of the burden inter se. That this seemed to the legislature to be an unjust burden to place on the new partner is shown by the terms of r. 9, particularly when it is realized that the rule refers to persons trading in partnership. It is in r. 9 that the provision (if any) is to be found in the Act of 1918 for a more equitable adjustment of the direct liability for the year's tax, apart, that is, from the limited relief possible under r. 11. But on the literal construction of the word "ceases" adopted by the Court of Appeal there is nothing directed to the case at least where the existing partners remain but a new partner is admitted. Clauson L.J. can only say (1) that there is a casus omissus which the partners new and old can deal with by the agreement under which the new partner is admitted, though clearly their domestic agreement could not affect the statutory incidence of the tax liability. But the principles of construction abhor, if it can be avoided, a casus omissus, especially one so obvious as this. I do not find the words "cease to carry on "the trade," etc., so precise and unambiguous as to be incapable of the meaning for which the appellants contend, when read in their surroundings. Construction ex vi termini involves a fitting together of words with their context. Words in most cases take their colour from their environment. We must, indeed, exclude certain words which are so precise and distinctive as to admit of only one meaning. Such words are generally technical or scientific. Other words may be so various in their connotation that without the context they cannot be understood, as for instance "quarter." But the majority of words and phrases depend on the context. Hence the familiar phrase that they must be construed secundum subjectam materiam.

Rule 9, like s. 6 of the Act of 1880, is a slipshod piece of draftmanship. It must, it seems, have been intended to cover the types of case mentioned in r. 11 of the Act of 1918. The framers of r. 9 may fairly be held to have taken the view that, if four partners admit a new partner and continue the business as a partnership of five, there is a change. The four old partners do not carry on the business on the same footing as before even if the actual business operations are unchanged. There is, on any view, a cessation of the old partnership business and the starting of a new partnership business. Even if the business remains the same and the name remains the same as before the change still the five who carry it on succeed to the four who did so before the change and the five can only succeed to the four if the four cease to carry it on, which is the fact because five partners carrying on a business jointly are different from four. Thus, a change in the persons jointly carrying on a business by the

(1) [1940] 2 K. B. 615, 628.

admission of a new partner may fairly be held to come within the very general words of r. 9, even though in one sense the previous partners may not cease to carry on the business. But the business is not the old business. The old business is superseded by a new business, with a different division of property ownership, of powers of agency and representative capacity, of rights on dissolution and of all the incidents of partnership, including joint liability. The draftsman may have had in mind that by English law the admission of a new partner involves a dissolution of the partnership and the starting of a new partnership which succeeds to the old firm. In that sense, the old partners may be said to cease to carry on the business. It is a joint business. A joint business carried on by four is different from a joint business carried on by five, even if the five include the original four. The addition of the new partner changes the constitution of the firm. As the Lord Chancellor has pointed out in his speech, this view brings the English way of looking at a partnership into line with the Scottish way, for the practical purposes of the revenue Acts which apply both to England and Scotland, and prevents a difference between the effect of the Acts in England as compared with their effect in Scotland, which would otherwise result from the fact that by the English law a firm is not, whereas by Scots law a firm is, a legal persona.

I have so far ignored the Finance Act, 1926, s. 32, because I do not see how the Act of 1918 can be construed in the light of the later Act of 1926. Sect. 32 of that Act did, indeed, give a new machinery to effect an equitable adjustment of tax where though a change has taken place in a firm during the year of charge, there was no complete change of identity in the partners because at least one partner remained throughout. But that machinery is optional, and where the option is not exercised, because, for instance, all the partners before and all the partners after the change would not agree to avail themselves of the machinery, r. 9 is as necessary as it ever was, and, indeed, is the only machinery to effect the readjustment. It was clearly not repealed by the Act of 1926, which in s. 35 expressly refers to it.

I am conscious, like the Lord Chancellor, that the question raised in this case does not admit of an entirely satisfactory solution, whichever view is taken. It can never be satisfactory to a court of construction to have to deal with words such as these, but I agree with him in thinking that on the whole it is more correct to give the wider meaning to r. 9 than to leave so obvious an anomaly, even though in practice the revenue authorities may not exercise their powers inequitably. The language of r. 9 is vague and obscure, and though in ordinary parlance it would not at first sight be natural to describe the four partners in a case like the present as ceasing to carry on the business merely because they take in a new partner, yet, in my opinion, when the words are read in their immediate context, in their general setting in the revenue system and in the light of partnership law, the meaning which I adopt is the true construction. That meaning achieves a practical and reasonable result, which is what the rule must, as it seems to me, have intended. I concur in the motion proposed.

LORD PORTER. My Lords, the question at issue in this case is a short but by no means easy one. Unfortunately, the Income Tax Acts are not a coherent whole but a congeries of provisions often enacted to deal with specific problems without any sufficient care to see how they fit into the general framework amid which they are inserted. Some of your Lordships in this House have set out the vital rule (r. 9 of the Rules applicable to cases I. and II. of sch. D of the Act of 1918), which requires elucidation, and in the course of the speeches delivered have traced the history of that rule itself and of the rules following it which deal with partnership businesses.

The argument on behalf of the subject, as I understand it, is that, in the case of a partnership, so long as one partner continues in the business it cannot be said that the partnership has "ceased to carry on a trade" or has been "succeeded by "another person." Partnerships, it is said, do not carry on a trade, the several partners do. An individual may cease to carry on a business and be succeeded by another person, and so may the individuals forming a partnership provided all the original partners are replaced by another person or other persons, but unless all are changed there is no cessation and no succession by a person carrying on the business. The argument is strengthened by pointing out that in r. 4 of cases I. and II. of sch. D contained in s. 100 of the Act of 1842, a distinction is made between a change of partners on the one hand, and a succession to a trade on the other, and that this distinction was continued in r. 11 of the Act of 1918, which substantially reproduces r. 4 of the Act of 1842, and, it is said, was again continued, though perhaps not quite so definitely, in the new r. 11 embodied in the Act of 1926. Rule 9, it is added, deals with cessation and succession and not with a change of partners. In spite of this forcible argument, if I were faced only with the rules as they now stand, I think that in common with my noble and learned friend, Lord Macmillan, I should without undue difficulty consider r. 9 at least capable of bearing the interpretation which the appellants put on it, more particularly in view of the circumstance, which he has pointed out, that r. 10 treats the entity of assessment as being the partnership and not the individuals composing it.

It is true that r. 9 speaks of persons ceasing to carry on a trade and being succeeded by another, but, for my own part, I can conceive of the legislature, when dealing with a partnership consisting of A, B, C and D, describing them as ceasing to carry on a trade when those four individuals cease to carry it on as a group and of their being succeeded by other persons when a different group of four carry it on (e.g., A, B, C and F), albeit three out of the four are persons who previously constituted the partnership. Some of the individuals, indeed, remain, but A, B, C and D have ceased to carry on the business and are succeeded by A, B, C and F. The phraseology may be loose inasmuch as strict accuracy compels one to acknowledge that in England, though not in Scotland, the business is carried on by the individual partners jointly and not by the partnership. Nevertheless, it is not unimportant to recall that one partner alone does not carry it on. The totality of members form a joint body of management and responsibility. It is interesting to observe in this connection that r. 9 speaks of cessation and succession as a change—as, indeed, it is—and thereby makes less marked the difference between the language used in r. 4 and the earlier r. 11 when referring to a change of partners and that used in a case where persons who are not partners cease to carry on a business and are succeeded by others. Moreover, those rules treat the death or dissolution of partnership as to all partners exactly on the same footing as the death or dissolution of some only. Further, as the Lord Chancellor has pointed out, it is at least possible to read the phrase "unless such partners or such person succeeding" as if "partners" as well as "persons" were qualified by the word "succeeding." Nevertheless, if I were dealing with a case where r. 4 of the Act of 1842, or the old r. 11 embodied in the Act of 1918, applied, I should be less willing to disturb the judgment of the Court of Appeal, not only because the construction of the Act is itself a matter of some doubt, but also because I feel the force of the reasoning of the Court of Appeal, and in a case of doubt recognize that your Lordships would affirm their decision.

But this House is not directly concerned with the Act of 1842 or with r. 11 of the Act of 1918 as it originally stood. In the language of the present r. 11 and elsewhere in the Act of 1926 there are, I think, some expressions sufficient to weight the scale in favour of the construction contended for by the appellants. I may tabulate them as follows: (i.) The present r. 11, sub-r. 2, speaks of a case of cessation and succession to which sub-r. 1 of the rule does not apply, and sub-r. 1 deals with changes of partnership. This phraseology gives some indication that in the Act changes of partnership are treated as involving a cessation of and a succession in the carrying on of the business. In this connection it is also, I think, not unimportant to observe that in the new rule, as in the old, no distinction is made between those cases where all the partners are changed and those where there is a change of some only or even nothing except an addition to or subtraction from the existent partners without further change. This, in my view, suggests that no difference was intended to be made between a complete and a partial change in the ownership of a business. (ii.) Rule 11, sub-r. 2, expressly provides that in that paragraph references to a person include references to a partnership. The conclusion I should draw is that the first paragraph was intended to deal primarily with a partial change of partners and the second as including a complete change and in each case the change is treated as a succession. (iii.) It was conceded by the respondents in argument that, except for the two years before the Act of 1926 came into force, r. 9 would find no set of circumstances on which to operate. It seems unlikely that Parliament would leave that rule unrepealed for all time, if this were the result of the new r. 11. At best this particular argument is only of slight weight, but I have some doubt whether the admission should properly have been made by the respondents if their argument is sound. If the business is carried on, not by the partnership, but by the individual partners, I see no reason why a new partner should not buy out an old one with the consent of the others. In such a case I should have thought it might be contended that the outgoing partner had ceased to carry on the business and the incoming one had succeeded him and that as between those two an apportionment under r. 9 should be made. This argument, however, does, to my mind, accentuate certain difficulties in the respondents' contentions. In the first place, the outgoing partner does not cease to carry on the business, he only ceases to help in doing so, and in the second place it would be an odd thing if apportionment were possible where partner succeeded partner, but none where the only change was that a new partner was taken in or an old one retired, and odder still if no apportionment were possible unless a new partner took exactly or substantially the old partner's share and place so that it could be said he had succeeded him. (iv.) Finally, s. 35, sub-s. 1, of the Act of 1926 contains the words "Provided that nothing in this "section shall be construed as limiting the power of the general "commissioners with respect to the adjustment of an assessment under r. 9 of the Rules applicable to cases I. and II. "of sch. D"—a provision which seems to indicate that that rule was intended to retain its effect in addition to the powers granted and obligations imposed by r. 11.

The general effect of this summary is to induce me to believe that in this difficult matter of construction r. 9 of the Act of 1918 continues to be effective and does apply to a partnership where a change of partners occurs though the old members are not superseded by entirely new persons. I cannot say that this result is achieved by that clarity of expression which one would desire in a taxing, or, indeed, in any, Act of Parliament, but of the two views I think it is the better. Accordingly I find myself in agreement with the opinions expressed by the Lord Chancellor, Lord Macmillan and Lord Wright in proposing that the appeal should be allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Janson, Cobb, Pearson & Co.*

F. C.

[HOUSE OF LORDS.]

CROFTER HAND WOVEN HARRIS TWEED COMPANY, LIMITED, AND OTHERS . . . . APPELLANTS;

AND

VEITCH AND ANOTHER . . . . RESPONDENTS.

H. L. (Sc.)*
1941
March 20, 21, 24, 25, 27, 28, 31;
April 1, 3, 24, 25, 28;
Dec. 15.

Trade Union—Combination—Resultant damage—Predominant object—Reasonable self-interest — Circumstances amounting to tortious conspiracy.

Considered. D. C
THOMSON LD. v
DEAKIN
[1952] 1 CH. 64

The respondents were officials of the Transport and General Workers' Union, to which all the dockers of Stornoway, the main port of the island of Lewis, and the great majority of the operatives employed in the spinning mills on that island belonged. The yarn spun in the mills was woven into tweed cloth by the crofters in their homes and the cloth, when woven, was finished in the island mills and sold by the mill owners as Harris tweed under a trade mark known as the "stamp." The appellants were producers of tweed cloth, which was also hand-woven by crofters, and could therefore be sold as Harris tweed, but not under the "stamp." The appellants obtained their yarn from the mainland at a cheaper price than that charged by the island mills and the cloth when woven was sent for finishing on the mainland.

The respondents, acting in combination with each other and, as held by Viscount Maugham and assumed for the purposes of their opinions by Lord Thankerton, Lord Wright and Lord Porter, in combination with the owners of the mills, instructed the dockers at Stornoway to refuse to handle yarn imported from the mainland consigned to the appellants and cloth made by the appellants which they desired to export, and as from January 24, 1938, the ✓dockers, without any breach of contract, acted in accordance with these instructions. The embargo was raised four days later as regards the export of the finished cloth of the appellants, but continued as regards the importation of yarn and the export of cloth sent for finishing to the mainland. The appellants sought interdict against the respondents to stop the embargo:—

Held, that the predominant purpose of the combination was the legitimate promotion of the interests of the persons combining, and since the means employed were neither criminal nor tortious in themselves, the combination was not unlawful.

Mogul Steamship Co. v. *McGregor, Gow & Co.* [1892] A. C. 25 applied. *Quinn* v. *Leathem* [1901] A. C. 495 and *Sorrell* v. *Smith* [1925] A. C. 700 considered and discussed.

Decision of the Court of Session 1940 S. C. 141 affirmed.

* *Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD THANKERTON, LORD WRIGHT and LORD PORTER.

APPEAL from the Second Division of the Court of Session.

The facts as stated by Viscount Simon L.C. were as follows: The appellants were seven producers of tweed cloth in the island of Lewis in the Outer Hebrides. Their business was carried on by purchasing yarn, which they gave out to crofters for weaving in their own homes, so that the appellants might sell the tweed so woven. The respondent, Mr. Veitch, was the Scottish area secretary of the Transport and General Workers' Union, which was a trade union, and the respondent, Mr. Mackenzie, was the Stornoway branch secretary of the union. The appellants sought interdict against the two respondents in order to stop what was called an "embargo" imposed by their order or inducement upon all yarn arriving for the appellants at the port of Stornoway, which was the main port on the island and was connected by a service of steamers with the mainland, and upon certain tweeds dispatched by the appellants from that port.

The dockers at Stornoway were all members of the trade union, and as from January 24, 1938, they refused to handle yarn imported from the mainland and consigned to the appellants, and also cloth made by the appellants which the appellants wished to export. This refusal was in accordance with the instructions of the respondent, Veitch, which were communicated by him to the respondent, Mackenzie, and were passed on by the latter to the dockers, who at once complied. The embargo against the exportation of finished tweeds was raised four days later, but in other respects the embargo continued, as regarded both the importation of yarn for the appellants, and the exportation of their unfinished tweed, dispatched for "finishing" on the mainland.

The description "Harris Tweed" was originally applied to woollen cloth, which was not only woven by hand-looms in the cottages of the Outer Hebrides, but was so woven out of yarn spun by hand in the islands. Moreover, "Harris Tweed" was hand-finished in the islands. It was thus a hand-produced and island-produced product throughout, and in 1911 a company limited by guarantee was registered under the name of the Harris Tweed Association, Ld., which obtained a Trade Mark (referred to as the "stamp") under s. 62 of the Trade Marks Act, 1905, to apply to Harris Tweed which satisfied those conditions. After a time, the hand-spinning of wool into yarn ceased to be commercially practicable and in 1934 the conditions of the trade mark were varied, with the result that it could apply to tweed hand-woven by the islanders in their own homes out of yarn spun in island spinning-mills, and finished in the island mills instead of by hand. Five such spinning-mills were established in Lewis. They did not use weaving machinery, but by placing their yarn in the hands of the hand-weaving crofters, cloth was produced which the mill-owners, after "finishing" it, could sell under the "stamp." Ninety per cent. of the spinners in the mills were members of the Transport and General Workers' Union—the same trade union as that to which all the Stornoway dockers belonged. The percentage of trade-unionists among the weavers in the cottages was much smaller. The officials of the union desired that none but members of their union should be employed, but when this was asked of the mill-owners in 1935, together with a rise in spinners' wages, the answer of the mills was that this was in existing circumstances impossible, and that a reduction in wages was more likely, owing (as was alleged) to the cut-throat competition of independent producers of cloth such as the appellants, who obtained their supplies of yarn from the mainland at a cheaper price than that charged by the mills. Cloth made out of mainland yarn could not carry the "stamp," though it could be sold as "Harris Tweed" as having been woven in the island.

How far there really was injurious competition was doubtful, but there was no evidence that the union officials did not believe it and the union official then mainly concerned, a Mr. Buchan, set himself to assist in establishing a minimum selling price for island cloth, and he, and after him Veitch, conceived that it would benefit their union members if conditions of collective bargaining could be established in the island between employers and employed. To this end, Mr. Buchan in 1935 proposed to Mr. Skinner, the secretary of the Mill-Owners' Association, a scheme whereby the trade union could "provide definite "safeguards to the successful operation of a minimum selling "price," and added that "the only argument that price-cutters "will ever understand and appreciate will be the joint power of "the employers and this Union to put them out of business if "they refuse loyally to abide by minimum selling prices as "fixed from time to time by the Harris Tweed Producers "Association." Mr. Skinner and the Mill-Owners' Association did not wish to avail themselves of Mr. Buchan's proposals at that time, and indeed throughout would seem to have preferred, if it had been possible, to get a settlement as to prices without trade union pressure. There remained on the side of the trade-union a constant desire to secure one hundred per cent. trade-union membership. After a long and complicated series of discussions and interviews, at the end of which the effort to secure by negotiation minimum prices and the use of none but island-spun yarn failed, Mr. Skinner informed Mr. Veitch that a settlement had not been reached, and an interview between them in Edinburgh took place five days before Mr. Veitch gave orders for the embargo.

The embargo continued until interim interdict was granted on February 24, 1938. On the trial of the cause in March, 1939, the Lord Ordinary (Lord Jamieson) gave judgment for the present respondents and recalled the interim interdict. On appeal to the Second Division this decision was affirmed (dissentiente Lord Mackay).

The appellants appealed.

L. H. Watson K.C., and *Cohen* for the appellants.

Thomson K.C., and *James Walker* for the respondents.

The arguments are sufficiently indicated in the opinions delivered.

Viscount Simon L.C. In argument before this House it was conceded that no issue is involved which might bring into the case any provision of the Trades Disputes Act, 1906. The respondents are sued as individuals and not in any representative capacity. The question is whether the appellants have established that the respondents have committed a delict or tort at common law against them by thus interfering with their trade. It was not suggested that, as regards the law applicable to the present action, there was any material difference between the Scottish law of delict and the English law of tort. We have been much assisted in examining what is undoubtedly a difficult case by the arguments of counsel on both sides. The evidence is voluminous and gave rise to a large number of questions as to the effect of it and as to the inferences to be drawn from it. For much of this detail I would refer to the full and careful judgments that have been delivered in Scotland. I accept, broadly speaking, the account given by Lord Jamieson, and the majority in the Court of Session, of the facts derived or deduced from that evidence. On one conclusion, however, which is apparently reached by the majority of the Inner House, I must express my hesitation. The appellants have

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strenuously argued that there was a combination between Mr. Veitch and Mr. Skinner to impose the embargo, and in particular rely on Mr. Veitch's letter to Mr. Mackenzie of January 19, 1938, requesting the latter to give instructions ~~to~~ to dockers, which contains the significant sentence "This "action will complete our deal with the employers and we will "have 100 per cent. membership, not only in the mills but "also in the weaving section." My own view is in accord with that of the Lord Ordinary (with which at least one member of the Inner House, Lord Wark, was disposed to agree) that, suspicious as the circumstances are, there is not sufficient evidence to establish that Mr. Skinner was combining with the respondents to impose the embargo : he was aware of the intention to impose it and he approved of it and was apparently willing to concede 100 per cent. membership to the union if his trade rivals were put out of business or compelled to buy yarn from the mills; but I am not prepared to hold that the respondents struck at the appellants because of a bargain so to do between Mr. Skinner and themselves.

The question to be decided is whether the appellants have proved that the respondents are liable to them for illegal conspiracy. In other words, is it proved that the two respondents combined together "to injure" the appellants in the way of their trade, and that the appellants have suffered damage from the respondents' illegal action ? Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it. (I am omitting consideration of those cases on the borderland of illegality, where the combination was held to amount to a criminal conspiracy because the purpose aimed at, though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct.) The crime consists in the agreement, though in most cases overt acts done in pursuance of the combination are available to prove the fact of agreement. But the tort of conspiracy is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced. It must be so, for, regarded as a civil wrong, conspiracy is one of those wrongs (like fraud or negligence) which sound in damage, and a mere agreement to injure, if it was never acted upon at all and never led to any result affecting the party complaining, could not produce damage to him. The distinction between the essential conditions to be fulfilled by the crime and the tort respectively are conveniently set out by Lord Coleridge C.J. in his judgment in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1): "In an indictment it suffices if the "combination exists and is unlawful, because it is the combin- "ation itself which is mischievous, and which gives the public "an interest to interfere by indictment. Nothing need be "actually done in furtherance of it. In the *Bridgewater* case (2), "referred to at the bar, and in which I was counsel, nothing was "done in fact; yet a gentleman was convicted because he had "entered into an unlawful combination from which almost "on the spot he withdrew, and withdrew altogether. No one "was harmed, but the public offence was complete. This is in "accordance with the express words of Bayley J. in *Rex* v. "*De Berenger* (3). It is otherwise in a civil action: it is the "damage which results from the unlawful combination itself "with which the civil action is concerned. . . . Once more, "to state the proposition somewhat differently with a view to "some of the arguments addressed to me, the law may be put "thus. If the combination is unlawful, then the parties to it "commit a misdemeanour, and are offenders against the State; "and if, as the result of such unlawful combination and "misdemeanour, a private person receives a private injury, that "gives such person a right of private action." There is nothing, I think, in the majority judgments in the *Mogul* case in the Court of Appeal (4), or in the speeches delivered on the appeal in that case to this House (5), which conflicts in any way with the above propositions, which indeed are now well-established. The appellants, therefore, in order to make out their case have to establish (*a*) agreement between the two respondents (*b*) to effect an unlawful purpose (*c*) resulting in damage to the appellants. As regards (*c*), there can here be no doubt. Instructing or persuading the dockers at Stornoway to refuse to handle imports of mainland-spun yarn arriving for delivery to the appellants was an interference with the appellants' normal source of supply, which was bound to damage their business. Still more, perhaps, was it an injury to the appellants to prevent by these means the sending of their unfinished cloth to the mainland. Indeed, it is one of the most serious aspects of this case, and an aspect that I deplore, that the action taken against the appellants not merely put pressure on them to adopt new arrangements, but might well destroy their business altogether without offering any locus pœnitentiæ. Whether this consideration affects the ultimate conclusion must be considered hereafter. I am equally satisfied about (*a*). It was argued that the respondent Mackenzie should not be regarded as acting in combination with the respondent Veitch, so as to establish the element of agreement between them in the tort of conspiracy, because Veitch held the responsible position of Scottish area secretary to the union, whereas Mackenzie was only branch secretary for Stornoway. This, I think, is an unsound contention. The respective position of the two men in the hierarchy of trade union officials has nothing to do with it. Even if Mackenzie could be regarded as only obeying orders received from his superior, the combination would still exist if he appreciated what he was about. But his share in the matter was more than this. Mackenzie is the representative of the union in the island of Lewis; he took the principal part in securing that the dockers at Stornoway should not handle the appellants' goods; there is no ground for supposing that he did not approve of the course taken, and he appears to have co-operated willingly. The Lord Ordinary, after a full and careful hearing, came to the conclusion of fact that (1) "the immediate purpose of "Mr. Veitch and Mr. Mackenzie was to force producers to come "to an agreement regarding the selling price of tweed and the "exclusive use of island-spun yarn. The means adopted "necessarily inflicted injury on the petitioners." Lord Jamieson went on to hold expressly that Mackenzie was a party with Veitch to the combination, on the grounds which I have indicated above. Questions (*a*) and (*c*) are, therefore, conclusively disposed of. The only difficulty in the case arises under (*b*). What exactly is meant, in this branch of the law, by a combination to effect an unlawful purpose? Lord Cave L.C., in *Sorrell* v. *Smith* (2), when what he called "the famous "trilogy of cases in your Lordships' House": *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3); *Allen* v. *Flood* (4); and *Quinn* v. *Leathem* (5) were submitted to a close examination in order to extract from them the principles involved, formulated

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(1) (1888) 21 Q. B. D. 544, 549.
(2) Unreported.
(3) (1814) 3 M. & S. 67, 76.
(4) (1889) 23 Q. B. D. 598.
(5) [1892] A. C. 25.

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(1) 1940 S. C. 141, 146.
(2) [1925] A. C. 700, 711, 712.
(3) [1892] A. C. 25.
(4) [1898] A. C. 1.
(5) [1901] A. C. 495.

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as a result two propositions of law which he stated as follows : (1.) A combination of two or more persons wilfully "to injure a man in his trade is unlawful and, if it results in "damage to him, is actionable. (2.) If the real purpose of the "combination is, not to injure another, but to forward or "defend the trade of those who enter into it, then no wrong is "committed and no action will lie, although damage to another "ensues." It should be observed that these two propositions, as the then Lord Chancellor said, were formulated as material for the decision of the case then before the House, and they may not turn out to be either as complete or as easy to apply in some other cases involving widely different circumstances. At any rate, I find it necessary, for the purpose of deciding the present appeal, to enter upon some further analysis.

It seems to me that the subject may be usefully approached by beginning with some preliminary propositions, not in themselves I think open to challenge at this time of day. In stating these propositions I shall try to distinguish between "damage" and "injury," following the stricter diction, derived from the civil law, which more especially prevails in Scottish jurisprudence. So used, ~~"injury"~~ is limited to actionable wrong, ~~while~~ "damage," in contrast with injury, means loss ~~or harm~~ occurring in fact, whether actionable as an injury or not. "An intent to injure, in strictness," said Bowen L.J. in the *Mogul* case (1) "means more than intent "to harm. It connotes an intent to do wrongful harm." First, then, apart from the effects of combination, it is clear that (1.) if A is damaged by the action of B, A nevertheless has no remedy against B, if B's act is lawful in itself and is carried out without employing unlawful means. In such a case A has to endure damnum absque injuria. (2.) It makes no difference to the above proposition that B in so acting had the purpose of damaging A. A bad motive does not per se turn an individual's otherwise lawful act into an unlawful one. (3.) If C has an existing contract with A and B is aware of it, and if B persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract, e.g., a father may persuade his daughter to break her engagement to marry a scoundrel. (This is not, of course, to say that the scoundrel

(1) 23 Q. B. D. 598, 612.

would not have an action against the daughter for breach.) The father's justification arises from a moral duty to urge C that the contract should be repudiated.

So far there is, I apprehend, little to dispute about. But if the act which damages A is not that of a single individual, but is due to a combination of two or more persons, then it is no longer possible to say that motive or purpose is immaterial. If, to use Lord Cave's language, the real purpose of the combination is the inflicting of damage on A as distinguished from serving the bona fide and legitimate interests of those who so combine, then if damage results to A, the act is tortious. Lord Halsbury L.C. observed in the *Mogul* case (1): "I do "not deny that there are many things which might be perfectly "lawfully done by an individual, which, when done by a "number of persons, become unlawful," and many citations to the same effect might be made from speeches delivering judgment since then in your Lordships' House. The proposition itself as to a wider range of liability for acts done in combination is now well established, though the legal reason for it may not be so easy to state. Lord Bramwell in the *Mogul* case (2) observed that it had been objected that it was strange that that should be unlawful if done by several which is not unlawful if done by one, and he offered some suggestions as an explanation. The view that the explanation is to be found in the increasing power of numbers to do damage beyond what one individual can do is open to the obvious answer that this depends on the personality and influence of the individual. In the play, Cyrano de Bergerac's single voice was more effective to drive the bad actor Montfleury off the stage than the protests of all the rest of the audience to restrain him. The action of a single tyrant may be more potent to inflict suffering on the continent of Europe than a combination of less powerful persons. Bowen L.J. when the *Mogul* case was before the Court of Appeal, observed (3): "The distinction "is based on sound reason, for a combination may make "oppressive or dangerous that which if it proceeded only "from a single person would be otherwise, and the very fact of "the combination may show that the object is simply to do "harm, and not to exercise one's own just rights." There is, however, another possible line of explanation which legal history suggests. Conspiracy, like libel, may be a crime.

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(1) [1892] A. C. 25, 38.
(2) Ibid. 45.
(3) 23 Q. B. D. 598, 616.

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As a crime it was developed by the Court of Star Chamber, and, on the abolition of that court, the crime as thus developed became a common law misdemeanour. Hence, according to Professor Holdsworth (History of English Law, vol. viii., p. 392), just as the courts came to the conclusion that if the defamation was written, so that the crime of libel had been committed, an action of tort lay at the suit of the injured party (in this instance without the need to allege and prove special damage), so, in the case of conspiracy an action in the nature of an action on the case would lie for damages at the suit of the party suffering, though here the gist of the action is that damage was inflicted by defendants who combined together for the purpose of inflicting it. However the origin of the rule may be explained, I take it to be clear that there are cases in which a combination of individuals to act in a certain way, resulting in deliberate damage to others, is actionable, even though the same thing, if done by a single individual without any element of combination, would not expose him to liability. In the present case, the evidence did not support an allegation that the defendants, or either of them, had procured a breach of contract, and if one of them, acting alone, had without employing unlawful means induced the dockers to refuse to handle the appellants' goods, I cannot see that any action would have lain against him. Everything turns, therefore, on whether the two respondents were engaged in a combination "to injure," in the sense in which that phrase is employed when liability results; it is to this question that I now address myself.

On this question of what amounts to an actionable conspiracy "to injure" (I am assuming that damage results from it), I would first observe that some confusion may arise from the use of such words as "motive" and "intention." Lord Dunedin in *Sorrell* v. *Smith* (1) appears to use the two words interchangeably. There is the further difficulty that, in some branches of the law, "intention" may be understood to cover results which may reasonably flow from what is deliberately done, on the principle that a man is to be treated as intending the reasonable consequence of his acts. Nothing of the sort appears to be involved here. It is much safer to use a word like "purpose" or "object." The question to be answered, in determining whether a combination to do an act which damages others is actionable, even though it would not be actionable if done by a single person, is not "did the combiners appreciate, "or should they be treated as appreciating, that others would "suffer from their action," but "what is the real reason why "the combiners did it ? " Or, as Lord Cave puts it, "what is "the real purpose of the combination ? " The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realize or should realize will follow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters, but purpose; the relevant conjunction is not ὥστε, "so that . . . ." but ἵνα, "in order "that."

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(1) [1925] A. C. 700, 724.

Next, it is to be borne in mind that there may be cases where the combination has more than one "object" or "purpose." The combiners may feel that they are killing two birds with one stone, and, even though their main purpose may be to protect their own legitimate interests notwithstanding that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right. The analysis of human impulses soon leads us into the quagmire of mixed motives, and even if we avoid the word "motive," there may be more than a single "purpose" or "object." It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person.

It will be observed that the above analysis tends to show that Lord Cave's two propositions in *Sorrell* v. *Smith* (1) are not necessarily exhaustive. He contrasts a combination wilfully to injure a man in his trade with a combination the real purpose of which is not to injure another but to forward or defend the trade of those who enter into it. It is possible to imagine a combination the purpose of which does not fall within either of these two classes—a combination, for example, to demonstrate the power of those combining to dictate policy or to prove themselves masters in a given situation. In such a case the purpose or object might well be neither wilfully to damage a man in his trade, on the one hand, nor to forward or defend trade interests in a situation where they would otherwise suffer on the other. If, for example, the mill-owners in the present case had promised a large subscription to the trade union funds as an inducement to bribe the respondents to take action to smash the appellants' trade, I cannot think that the respondents could excuse themselves for combining to inflict this damage merely by saying that their predominant purpose was to benefit the funds of the union thereby.

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(1) [1925] A. C. 712.

It may well be that in this corner of the law it is not possible to lay down with precision an exact and exhaustive proposition like an algebraical formula which will provide an automatic answer in every case that may arise by substituting the actual instance for a generalization. There is an interesting passage in the recently published correspondence between O. W. Holmes J. of the United States Supreme Court and Sir Frederick Pollock which in discussing some earlier cases suggests as much (see Holmes-Pollock Letters, vol. i., p. 65). Lord Dunedin, I think, had the same view in mind when, in his speech in *Sorrell* v. *Smith* (1) he referred to the test furnished by "that inner standard of right and wrong." Lord Sumner's disclaimer, in the same case (2), of an ability to draw any definite line "between acts, whose real purpose is to advance "the defendants' interests, and acts, whose real purpose is to "injure the plaintiff in his trade" points in the same direction. The exoneration provided by "justification" or "just cause" to which Lord Cave refers as an alternative way of indicating the limit between combinations that are lawful and combinations that are unlawful (see, for a further illustration, the language of Romer L.J. in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (3)) is another indication of the difficulty in the way of abstract precision. I am content to say that, unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful. Although most of the cases have dealt with trade rivalry in some form or other, I do not see why the proposition as to the conditions under which conspiracy becomes a tort should be limited to trade competition. Indeed, in its original sense, conspiracy as a tort was a combination to abuse legal procedure: see Winfield's History of Conspiracy, c. ii. I have used the word "directly" without seeking to define its boundaries as an indication that indirect gains, such as the subscription in the illustration above, would not provide a justification.

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(1) [1925] A. C. 700, 717.
(2) Ibid. 742.
(3) [1903] 2 K. B. 600.

In the present case, the conclusion, in my opinion, is that the predominant object of the respondents in getting the embargo imposed was to benefit their trade-union members by preventing under-cutting and unregulated competition, and so helping to secure the economic stability of the island industry. The result they aimed at achieving was to create a better basis for collective bargaining, and thus directly to improve wage prospects. A combination with such an object is not unlawful, because the object is the legitimate promotion of the interests of the combiners, and because the damage necessarily inflicted on the appellants is not inflicted by criminal or tortious means and is not "the real purpose" of the combination. I agree with Lord Fleming when he says in his judgment that it is not for a court of law to consider in this connection the expediency or otherwise of a policy adopted by a trade union. Neither can liability be determined by asking whether the damage inflicted to secure the purpose is disproportionately severe: this may throw doubts on the bona fides of the avowed purpose, but once the legitimate purpose is established, and no unlawful means are involved, the quantum of damage is irrelevant. I move that this appeal be dismissed with costs.

VISCOUNT MAUGHAM. My Lords, I have had the advantage of reading the opinion of my noble friend on the Woolsack and, except in one matter which I regard as of importance, I agree with his summary of the facts. With the greatest respect I am of opinion that the embargo is proved to have been imposed in pursuance of a combination between Mr. Veitch and the millowners. My grounds for this view are precisely those set out in the opinion of Lord Fleming in the Second Division, to which I find I cannot usefully add anything. I also find myself in substantial agreement with what my noble friend has said as to the law in so far as it relates to combinations resulting in injury to others, that being the only subject with which I for my part think it necessary to deal on this appeal. If I add some remarks of my own, it is

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partly because of the great importance of this case and partly as a recognition of the able and candid arguments which were addressed to us. I will add by way of preface that it seems to me beyond dispute that Lord Macnaghten's statement as to a conspiracy to injure giving rise to civil liability in *Quinn* v. *Leathem* (1) is now well-settled law. I have never myself felt any difficulty in seeing the great difference between the acts of one person and the acts in combination of two or of a multitude.

As appears from the statement of facts which is contained in the opinion referred to, there is a peculiarity in the case which should be remembered. The appellants, who are small producers, carried on their somewhat humble businesses in the Isle of Lewis, where they were weaving a tweed called Harris tweed from yarn spun on the mainland. The respondents were officials of the Transport and General Workers' Union, a duly registered trade union. The only shipping services between the mainland and the Isle of Lewis are provided by Messrs. David MacBrayne, Ld., and Coast Lines, Ld. They ply to and from Stornoway. The dockers at that port are all members of the trade union and it is admitted that they act on the instructions of the respondents, who are or were the Scottish area secretary and the Stornoway branch secretary of the trade union. Orders were given on January 20 and 21, 1938, by the respondents to the dockers at Stornoway to refuse to handle any consignments of yarn from the mainland to the appellants and any consignments of tweed from the appellants to the mainland. These orders were carried out (without any breach of contract) and the business of the appellants was thus brought to a complete standstill. It is evident that the power of the trade union officials in the circumstances which exist in the island is so great that the business and the means of subsistence of everyone who resides there are at the mercy of the trade union officials. If they should be so disposed, an event which I hope is unlikely, a tyranny of the most serious character might follow unless the case happened to be one in which the court could properly interfere. It accordingly seems to me to be very desirable that the reasons which determine the conclusion of this House on the present appeal should be stated with great clearness.

The Lord Ordinary and some of the Lords in the Inner

(1) [1901] A. C. 495, 510.

House have used phrases which seem to suggest that once it is found that the infliction of injury on the petitioners was not the real purpose or object of the embargo that is the end of the matter. I must say plainly that I disagree with this view and I do not think the decision in *Sorrell* v. *Smith* (1) justifies it. To suppose that it follows from an absence of malice or ill will that the true motive of the acts done in combination was to further the legitimate interests of the parties to the combination seems to me to be a non sequitur. For example, there was a possibility that the respondents were taking the action they did merely to demonstrate the power of the trade union to control the trade of the island in every detail, or again because they had been induced by some valuable consideration coming from the millowners on the island to put the petitioners out of business in order to secure for the millowners a complete monopoly in relation to the spinning and finishing of Harris tweed. I will give some other illustrations later. Moreover, there are the cases of mixed motives which might have to be considered.

My Lords, Lord Cave L.C., in delivering his judgment in *Sorrell* v. *Smith* (2) remarked as follows: "I deduce as "material for the decision of the present case two propositions "of law, which may be stated as follows:—(1.) A combination "of two or more persons wilfully to injure a man in his trade "is unlawful and, if it results in damage to him, is actionable. "(2.) If the real purpose of the combination is, not to injure "another, but to forward or defend the trade of those who "enter into it, then no wrong is committed and no action "will lie, although damage to another ensues. The distinction "between the two classes of case is sometimes expressed by "saying that in cases of the former class there is not, while in "cases of the latter class, there is, just cause or excuse for the "action taken." I do not think there is any doubt that Lord Cave's two propositions are sound, and they were accepted as correct by Lord Atkinson and also, as I read his judgment in the same case, by Lord Sumner. In *Sorrell* v. *Smith* (1), in my opinion no new law was laid down by this House. It was merely in the view of their Lordships an unusual illustration of the proposition decided in the *Mogul* case (3), that a combination to do acts the purpose and object of which is to forward or defend the trade or business interests of the

(1) [1925] A. C. 700.
(2) Ibid. 712.
(3) [1892] A. C. 25.

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defendants is not actionable even though the necessary effect is to cause damage to the plaintiffs (*Sorrell* v. *Smith* (1) per Lords Cave (2) and Atkinson (3), and per Lord Sumner (4), and per Lord Buckmaster (5)). If I correctly understand Lord Dunedin's opinion, he took a somewhat different view from that of the majority, and disputed the accuracy of the opinion so often expressed and still more often assumed by various judges that a just cause or excuse must be shown and that if the real purpose of the combination is not to forward or defend the trade or the interests of those who enter into it, the defendants generally speaking must show some other just cause or excuse for the action taken in combination. Lord Cave after stating the two propositions of law above cited proceeded to classify the more important of the judgments on which he relied for his propositions, in several of which the reference to " just cause or excuse " will be found. I need not repeat these authorities ; but I think it is desirable to point out that it is implicit in the *Mogul* case (6), both in the Court of Appeal and in this House that the acts done in combination by the shipowners who were defendants were done (to use the language of Lord Watson) " with a single view to "the extension of their business and the increase of its "profits" (7). The headnote to that case, which in my opinion is accurate, is in these terms (8) : " Held, that since the acts "of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, "and since they had not employed any unlawful means, the "plaintiffs had no cause of action." The speeches of the seven noble lords who attended are directed to showing that any form of competition in trade is legitimate and lawful, that is, formed a just excuse, provided that illegal means are not used. No one suggested that if malevolence was not in question, the action must necessarily fail, and I agree with my noble friend Lord Wright in thinking that malevolence as a mental state is not the test of liability. It was implicit, as I think, that lawful competition was the true and necessary answer to the action in *Sorrell* v. *Smith* (1). Moreover general approval was expressed of the opinions of Bowen and

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(1) [1925] A. C. 700.
(2) Ibid. 715.
(3) Ibid. 716.
(4) Ibid. 733, 743.
(5) Ibid. 746.
(6) 23 Q. B. D. 598 ; [1892] A. C. 25.
(7) [1892] A. C. 25, 42.
(8) Ibid. 26.

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Fry L.JJ. in the Court of Appeal (1). I can see no reason for doubting the correctness of the well-known statements of Bowen L.J. in the Court of Appeal (2). His judgment is essentially devoted to the inquiry whether the acts of the defendants were done " without any just cause or excuse." If, adopting another mode of approach, it is said that the acts in combination must *in law* be " malicious " if, being acts which necessarily injure the plaintiff, they are done without just cause or excuse, we are reduced to a mere question of words. Quâcunque viâ the acts in combination are unlawful unless there is just cause or excuse. For myself on this point, which Lord Dunedin describes as " hypercritical " (3), I must say that I prefer Bowen L.J.'s method of dealing with the matter, approved, as I think it is, by the majority of the noble Lords who decided *Sorrell* v. *Smith* (4). I must add that I do not think it possible (as Lord Dunedin seems to have thought) that Bowen L.J. was influenced in using his phrases by *Bowen* v. *Hall* (5), which related to the different case of the inducing of a person under personal contract to break it; nor do I think that the judgments in *Allen* v. *Flood* (6) would have altered his view since that case had nothing to do with a question of combination.

It seems to me, therefore, and with the greatest deference to those who perhaps think otherwise, a mistake to hold that combinations to do acts which necessarily result in injury to the business or interference with the means of subsistence of a third person are not actionable provided only that the true or predominant motive was not to injure the plaintiff and that no unlawful means are used. For instance, the object of the combination may be a dislike of the religious views or the politics or the race or the colour of the plaintiff, or a mere demonstration of power by busybodies. Again the persons joining in the combination may have been induced so to act by payment of money or by some other consideration. There is, I think, no authority to be found which justifies the view that a combination of such a character, causing damage to the plaintiff, would be lawful. Since there are many cases of combinations which directly result in injury to others, but do not fall within either of those two categories mentioned by

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(1) [1892] A. C. 25, 37, 43, 47, 51, 57.

(2) 23 Q. B. D. 598, 613, 617.

(3) [1925] A. C. 700, 726.

(4) Ibid. 700.

(5) (1881) 6 Q. B. D. 333.

(6) [1898] A. C. 1.

Lord Cave, one question is whether in the present case we are not confronted with facts which, admittedly not within the first proposition, are or are not within the second. We may formulate the question thus: Was the real or predominant purpose of the combination to forward or defend the trade or business interests of the trade union and its members and of the millowners? If the answer is in the negative it would be necessary very carefully to examine "the real purpose" or "the true motive" (which I think is the same thing) of the combination and to consider whether there was in the eyes of the law a just cause or excuse for taking or directing acts in combination which will destroy the present means of subsistence of the appellants. On this point, if it arises, there is little authority to guide us, but I will add that when the question of the real purpose is being considered it is impossible to leave out of consideration the principle that men are in general to be taken as intending the direct consequences of their acts: see the summing up of Fitzgibbon L.J. in *Quinn* v. *Leathem* (1), which was approved in this House. It may be worth noting that in the days of Erle J. there was often no other way of ascertaining the purpose of a conspiracy. I should add that "motive" is clearly not the same thing as "intention," but in many cases the one is the parent of the other, and they are so closely related that they cannot be separated. (See for some interesting remarks on this subject Wills on Circumstantial Evidence, 7th ed., pp. 62 to 64.) If there are mixed purposes or motives the difficulties that arise on the question of fact may be very great and it may be impossible to answer the question above stated in the affirmative. It is worth while to note that *Quinn* v. *Leathem* (1) is an example of a mixed motive; for there the defendants, being officials and members of a trade union, combined to call out the union workmen of the plaintiff Leathem if he would not discharge some non-union men in his employ, and also to call out the union workmen of a customer of Leathem called Munce if he did not cease to deal with Leathem. It is true that there was the finding of the Belfast jury that what the defendants had done was done with malice in order to injure the plaintiff; but it can scarcely have been in doubt that one at least of the motives actuating the defendants was the benefit of their trade union. As Lord Lindley remarked (2): "That they (the defendants)

(1) [1901] A. C. 495, 499.

(2) Ibid. 536.

"acted as they did in furtherance of what they considered "the interests of union men may probably be fairly assumed "in their favour." The facts as set out in detail in Lord Brampton's speech show clearly that the whole dispute between Leathem and the trade union originated in Leathem's refusal to dismiss non-union workmen. It must, however, be assumed from the findings of the jury that the main object or purpose of the defendants was to punish or injure Leathem and that this was " malicious," whatever the precise evidence of malice may have been. It was never suggested by anyone that if the defendants' acts were at least partly in furtherance of trade union interests that would be a defence to the action. The case of *Conway* v. *Wade* (1) may usefully be referred to in this connection.

An obvious difficulty arises at the outset if we accept, as I do (as above stated), the view that the combination was between the respondents and the millowners. The interests of these two groups were very different and indeed they were in some respects conflicting. If it is proved, as the Lord Ordinary held, that the object of the respondents was to benefit the trade union and its members and if it is to be inferred that the object of the millowners was to benefit themselves by obtaining a species of monopoly in the matter of milling, is that sufficient to bring the case within the principle of the *Mogul* case (2) ? It was argued with force that, accepting the doctrine laid down in *Sorrell* v. *Smith* (3), you must look at the joint object of the parties combining and if they have substantially different objects, the decision in the *Mogul* case (2) will not apply. I have carefully considered this point, which is not unattractive, and I cannot find it has ever been precisely dealt with in any of the cases. On the whole, however, I have come to the conclusion that following the principle of the *Mogul* case (2), it is sufficient if all the various combining parties have their own legitimate trade or business interests to gain, even though these interests may be of differing kinds. If indeed some of these parties were actuated merely by hate or vindictive spite or with no just excuse at all, I should doubt very much whether the defence would succeed. But I think reasonable self-interest in trade or business is " a "just cause or excuse " for those combining even though each of them " has his own axe to grind." For instance, I cannot

(1) [1909] A. C. 506.
(2) [1892] A. C. 25.
(3) [1925] A. C. 700.

think that the *Mogul* case (1) would have had a different result if tea merchants had joined in the combination of shipowners. And it is easy to imagine a case where shipowners and railway companies might wish to combine to get business though their interests were in some respects conflicting ; and other examples will occur to everyone with a knowledge of competitive trade. In my opinion the principle of the *Mogul* case (1) will protect persons who combine for their respective business interests if there is a certain identity of object, that whether they do or not is a question of motive or object, and that the circumstance that their business interests are by no means the same is not a ground for holding that the combination is illegal.

My Lords, in my opinion, when it is proved or admitted that the respondents had no personal ill-will towards the appellants, the difficulties of this case begin. I do not propose to recapitulate the facts, but it is to be remembered that there are a number of circumstances which might have justified a very adverse view of the respondents' motives. I will summarize the most important of them. First, what was done was not "in furtherance of" or "in contemplation of" a trade dispute. Secondly, as I have said, I accept the view of Lord Fleming and, I should add, very forcibly expressed by Lord Mackay, that there was a combination between Mr. Veitch and Mr. Skinner and some at least of the millowners to procure the embargo. Thirdly, the acts complained of were obviously in the interests of the millowners on the island since they secured a species of monopoly. Fourthly, Mr. Veitch's letter of January 19, to Mr. Mackenzie is, I think, only consistent with the view that there was a "deal" between Mr. Veitch, Mr. Skinner, and some at least of the millowners with regard to the laying-on of the embargo, the general understanding being that if an embargo were to be imposed by Mr. Veitch, the millowners would concede the union demand for 100 per cent. union membership in the mills of the island. Fifthly, Mr. Veitch apparently accepted as true certain statements of Mr. Skinner as to the condition of the industry and as to the effect of the importation of mainland yarn, which the least inquiry would have shown to be inaccurate. Sixthly, Mr. Veitch's elaborate report to Mr. Bevin (the general secretary of the union at that time) as to his grounds for imposing the embargo is so extravagant, abusive and inaccurate in its terms that I find it difficult to understand

(1) [1892] A. C. 25.

how it can have been written with a legitimate purpose. It was a carefully considered document composed between January 14 and February 3. It suggested (untruly) that the appellants were evading the "stamp," deceiving the public, ruining the industry, and bringing distress to the Outer Hebrides, that they were "get-rich-quick merchants" who cared nothing about the distress on the islands, that the importation of mainland yarn was "killing the industry," and that they were an "unscrupulous lot" who were importing "blackleg yarn." There was nothing said in the letter about the "deal" with the millowners; indeed, it was asserted (inaccurately) that in the mills they already had 100 per cent. "organization." The document was completely misleading, and in fact it misled the general council of the union when it was read on March 8, 1938. Seventhly, it should be observed that no notice was given to the appellants as to the intention to apply the embargo and no opportunity given to them to cease using mainland yarn if they were so advised. Lastly, it is a strange feature in the case that one at least of the avowed purposes of the acts of the respondents was to secure the 100 per cent. membership of the union in the mills, whilst the appellants, who were attacked, were completely unable to secure or to influence such a result, since they had nothing whatever to do with the management of the mills, and the result was to be secured, if at all, by the "deal" with the millowners.

My Lords, there are certain explanations offered as regards these facts and no doubt some other circumstances to be borne in mind, but I must confess that, if I were entitled to form a conclusion simply from the documents and the shorthand notes of the trial, I should find it impossible to hold that the respondents had established that they and the millowners had combined simply or mainly for the purpose of promoting their own interests, that is, those of the trade union and of the millowners respectively. This House, however, is always most reluctant to differ from the findings of the trial judge on a question of fact and a fortiori when the appellate court has come to a like conclusion. The question here is mainly one relating to the objects or motives of the respondents, both of whom were called as witnesses and elaborately cross-examined. It has been well observed that if they were, as seems probable from the shorthand notes, both stupid and wrong-headed, the circumstance may afford an explanation of acts and writings which in the case of persons of greater acuteness would tend strongly in favour of a sinister motive. The Lord Ordinary appears to have believed these persons, though he was not very pleased with them as witnesses. The majority of the Inner House agreed with him. I do not feel at liberty to differ. My conclusion therefore must be based on these facts: On the one hand it is proved that the respondents and the millowners were not actuated by an intention to injure as a predominant motive in their minds. On the other hand they were acting, or must be taken to have been acting, with the main object of benefiting themselves in this sense, that the respondents were seeking to advance what they conceived to be the interests of their trade union and their members, and the millowners were seeking to obtain an obvious trade advantage for themselves, and no doubt in a rather general sense they all had a common interest in the prosperity of the Harris tweed industry. The case, therefore, is brought, though I think with difficulty, within the principle of the *Mogul* case (1), as explained in later cases, and the appeal must fail.

As regards the ultimate result, I must add this warning. The only question before the Lord Ordinary was whether the then petitioners were entitled to have the respondents interdicted from instructing members of the trade union at Stornoway to refuse to load or unload consignments of yarn or unfinished tweeds consigned to or dispatched by the petitioners. The original embargo was directed on January 19, 1938, and extended to the loading of finished and unfinished tweeds dispatched by the petitioners, but on January 25, 1938, it was modified by permitting the exportation of finished tweeds. An interim interdict was granted to the appellants on February 24, 1938, and the embargo then dropped. When the interim interdict was recalled on March 8, 1939, it appears that the embargo was not re-imposed. The only question on appeal to the Inner House and to this House has necessarily been whether the interdict should have been continued by the Lord Ordinary. On that matter the courts were bound to consider the propriety of the action of the respondents and the millowners in the light of the views honestly entertained by them at that time as to their respective interests and as to the actions and conduct of the appellants. In so far as those views have since been shown to have been ill-founded, they would not now justify the re-imposition of the embargo. If such a step as that is contemplated, the matter ought to be reconsidered in view of the circumstances and facts as they are now known to exist.

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(1) [1892] A. C. 25.

My Lords, for the reasons above stated I concur in the proposed motion.

LORD THANKERTON. My Lords, the appellants are seven out of the original petitioners in a petition and complaint by nine small producers of Harris Tweed in the Isle of Lewis, presented on February 24, 1938, seeking to have the present respondents interdicted from interference with the consignments of yarn or unfinished tweeds consigned to or dispatched by the petitioners at the port or harbour of Stornoway. The petition and complaint was dismissed, after proof, on the merits by the Lord Ordinary (Lord Jamieson) on March 8, 1939, and his interlocutor was adhered to by the Second Division (Lord Mackay dissenting) on December 22, 1939, and the reclaiming motion by the nine petitioners was refused, but, in respect of an undertaking by the respondents not to continue the embargo against the petitioners, William MacLeod and Donald Campbell, the latter were awarded the expenses incurred by them in the reclaiming motion. The remaining petitioners appeal against these interlocutors.

While the respondents are cited as individuals, they are respectively the Scottish area secretary and the Stornoway branch secretary of the Transport and General Workers' Union at Stornoway, and the terms of the interdict sought for are "to interdict, prohibit and discharge the respondents "from instructing, procuring, persuading or inciting, or "continuing to instruct, procure, persuade or incite members "of the Transport and General Workers' Union at Stornoway, "to refuse to load or unload on to or from vessels in the port "or harbour of Stornoway consignments of yarn or unfinished "tweeds consigned to or dispatched by the petitioners, or "any of them, or from interfering in any manner or way with "the consignment to or dispatch by the petitioners, or any "of them, of consignments of yarn or unfinished tweeds "consigned to or dispatched by them at the port or harbour "of Stornoway." In the record the appellants plead two grounds of action in their first and fourth pleas-in-law, which are as follows: "(1.) The respondents having illegally conspired "together to interfere with and damage the petitioners' "legitimate rights to trade as condescended upon, interdict "should be granted as craved. (4.) Separatim, and, in any "event, the respondents having by their actings wilfully "interfered with and obstructed the petitioners' contractual "relations and liberty to exercise their trade, and having "thereby caused injury to the petitioners, interdict should be "granted as craved." Any evidence bearing on the fourth plea was negligible, and the appellant made no case on it before this House, but confined his contentions to the first plea. The Lord Ordinary says: "The petitioners aver on "record that the laying on of the embargo was the result of a "conspiracy between the respondents and representatives of "companies owning spinning mills on the island to injure the "petitioners' trade and unlawfully to force them to use island "spun yarn in the manufacture of their tweed. Alternatively "they aver that the respondents were acting in concert for the "purpose of injuring their legitimate trade. Their plea is that "the respondents conspired together. The plea is not very "happily expressed, but in my view it is sufficient to cover the "wider conspiracy and the case was argued on both alternatives." I may say at once that, in my opinion, the first plea is quite inapt to cover the wider conspiracy, and should have been amended, which could have been done, without difficulty, as the case on the wider conspiracy has been fully dealt with, apparently without objection on this point. The Lord Ordinary held that the narrower conspiracy had been proved in the sense of joint action by the respondents, but he held that the wider conspiracy had not been proved, and that the alleged intent of the respondents to injure the petitioners' trade had not been proved. In the Inner House, the learned judges of the Second Division held that the wider combination had been proved, but (Lord Mackay dissenting) that the intent to injure had not been established. Before your Lordships the appellants confined their case to the wider combination, as regards which they had the favourable decision of the Second Division. The evidence was very fully dealt with in the opinions of the learned judges, and I find it unnecessary to deal with it in detail. My Lords, as regards the proof of the wider combination, I am prepared—using the words of the late Lord Justice Clerk (1)—"to hold that there was some kind "of understanding more or less defined between Mr. Veitch "and Mr. Skinner that, *if* the union took action and imposed

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(1) 1940 S. C. 141, 153.

"an embargo against the importers of yarn, the union in turn "would be assisted by the millowners to get their 100 per cent. "membership. But I am not satisfied by the evidence that "there was any decision taken by Mr. Skinner and Mr. Veitch "that deprived Mr. Veitch of the liberty to decide for himself "in consultation with his own officials whether and when an "embargo should be imposed. I shall, however, take the "case on the assumption that a definite arrangement to "impose an embargo was reached."

This leaves the crucial question whether the appellants have proved that the respondents' intention was to injure the appellants' trade, as to which the appellants have the findings of both the lower courts against them. The reluctance of this House to interfere with such findings, and in particular with the findings of the trial judge, who has had the advantage of seeing the witnesses, which has repeatedly been expressed, is all the stronger in a case such as the present, in which the intention of the respondents, both of whom gave evidence, was in issue. That Veitch, for instance, was stupid or wrongheaded, or acted without making proper inquiries may be quite consistent with the absence of any intention to injure, and the Lord Ordinary has so found; indeed, stupidity or wrongheadedness might tend to disprove any such intention. The Lord Ordinary sums up the evidence thus (1): "In the "present case the immediate purpose of Mr. Veitch and "Mr. Mackenzie was to force producers to come to an agreement regarding the selling price of tweed and the exclusive "use of island spun yarn. The means adopted necessarily "inflicted injury on the petitioners. But was the infliction "of injury Mr. Veitch's motive? Lord Dunedin in *Sorrell* v. "*Smith* (2), suggested a test as follows. 'Was such a purpose "' the real root of the acts that grew from it, or was the true "' motive of the acts something else, as such, for instance, "' the furtherance of the defendant's own business?' Applying "this test the answer must be in the negative. There is no "evidence that Mr. Veitch had evinced any malice or ill-will "towards any of the petitioners, or that he was prompted by a "desire to destroy the trade of any persons who were employing "weavers and paying them the union rate of wages. The "purpose at the root of his action was to advance the position "of the union and its members, however mistaken he may "have been in the means he adopted to secure that end. It

(1) 1940 S. C. 146, 147. (2) [1925] A. C. 700, 717.

"may be that the benefits hoped to be obtained would have "been an ultimate and not an immediate consequence of the "action taken, but I do not think it would have been any more "remote than in the cases of *Sorrell* v. *Smith* (1) and *Ware and "De Freville, Ld.* v. *Motor Trade Association* (2)."

My Lords, the critical examination of the evidence by the appellants' counsel and his able argument, have entirely failed to satisfy me that I am in a position to set aside the conclusion of the Lord Ordinary; on each point of criticism in regard to which there appeared to be ground for argument, I felt satisfied that a personal observation of the witness under examination would have been a material help to the solution of the point, and this is the very foundation of the reluctance of an appellate court to interfere in such circumstances. In this view of the facts I find it unnecessary to deal further with the previous decisions on this branch of the law, as there can be no doubt that the appeal fails. But I desire to refer to one aspect of this case in order to make clear that, in my opinion, this case does not raise a question of law which is of importance and may come up for consideration in the future, and that is as to what limit is to be placed as to the means by which the pressure is operated in these cases. In the present case the pressure was applied by means of action by the dockers, who were in no sense employees in, or directly connected with, the trade in Harris tweed; but employees in this trade were members of the same union, and the interest of the dockers and the trade employees in the union and its welfare were mutual, and I can see no ground for holding that it was not legitimate for the union to avail itself of the services of its docker members to promote the interests of the union. On the other hand, I doubt if it would be legitimate for a union to use a means of pressure with which it had no connection except that which was constituted by a money payment, for instance. However, I have referred to this question only in order to make clear that, in my opinion, it does not arise for decision in this case, and that I express no opinion on it.

LORD WRIGHT. My Lords, I have had the opportunity of considering in print the account of the facts which my noble and learned friend the Lord Chancellor has given in his opinion, which I agree with and adopt. I should, however, observe that, in regard to the issue whether certain millowners, in particular Mr. Skinner, were parties to the combination, I am prepared, like the Lord Justice Clerk, for purposes of this case to assume that they were. This view was strongly pressed in argument by counsel for the appellants. It is obviously the assumption which is most favourable to them. Lord Mackay, in his dissenting judgment, forcibly relied on his conclusion that there was a compact between the respondents and the millowners. On the whole I think it is fairer to the appellants to proceed on that assumption. In the end it does not appear to me to affect the issue. There was clearly, in any case, combination between the two respondents, who were both responsible trade union officials.

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(1) [1925] A. C. 700.
(2) [1921] 3 K. B. 40.

The cause of action set out in the appellants' claim is for a conspiracy to injure which is a tort. The classical definition of conspiracy is that given by Willes J. in advising the House of Lords in *Mulcahy* v. *Reg.* (1): "A conspiracy consists not "merely in the intention of two or more, but in the agreement "of two or more to do an unlawful act, or to do a lawful act "by unlawful means." This must be supplemented by observing that though the crime is constituted by the agreement, the civil right of action is not complete unless the conspirators do acts in pursuance of their agreement to the damage of the plaintiffs. The concept of a civil conspiracy to injure has been in the main developed in the course of the last half century, particularly since the great case of the *Mogul Steamship Co.* v. *McGregor & Co.* (2). Its essential character is described by Lord Macnaghten in *Quinn* v. *Leathem* (3), basing himself on Lord Watson's words in *Allen* v. *Flood* (4): "a conspiracy to injure might give rise to civil "liability even though the end were brought about by conduct "and acts which by themselves and apart from the element of "combination or concerted action could not be regarded as a "legal wrong." In this sense the conspiracy is the gist of the wrong, though damage is necessary to complete the cause of action. The opposite view had been expressed by Palles C.B. in *Kearney* v. *Lloyd* (5). He held that the gist of the action was not the conspiracy itself, but the particular wrongful acts done in pursuance of it, and that the cause of action must exist if the allegation of conspiracy were struck out. Later cases, however, have decisively held the contrary, as I shall

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(1) (1868) L. R. 3 H. L. 306, 317.

(2) [1892] A. C. 25.

(3) [1901] A. C. 495, 510.

(4) [1898] A. C. 1, 108.

(5) (1889) 26 L. R. Ir. 268.

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show. The rule may seem anomalous, so far as it holds that conduct by two may be actionable if it causes damage, whereas the same conduct done by one, causing the same damage, would give no redress. In effect the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides. It is a different matter if the conspiracy is to do acts in themselves wrongful, such as to deceive or defraud, to commit violence, or to conduct a strike or lock-out by means of conduct prohibited by the Conspiracy and Protection of Property Act, 1875, or which contravenes the Trade Disputes and Trade Unions Act, 1927. But a conspiracy to injure is a tort which requires careful definition, in order to hold the balance between the defendant's right to exercise his lawful rights and the plaintiff's right not to be injured by an injurious conspiracy. As I read the authorities, there is a clear and definite distinction which runs through them all between what Lord Dunedin in *Sorrell* v. *Smith* (1) calls "a conspiracy to injure" and "a set of "acts dictated by business interests." I should qualify "business" by adding "or other legitimate interests," using the convenient adjective not very precisely. It may be a difficult task in some cases to apply this distinction. It depends largely on matters of fact, but also on a legal conception of what is ✓meant by "intention to injure." The appellants contend that there was here an intention to injure even though it is negatived that the respondents were actuated by malice or malevolence. In substance what the appellants say is that the issue between the millowners and the yarn importers was one between two sets of employers, in which the men were not directly concerned, and that the union's action was an unjustifiable and meddlesome interference with the appellants' right to conduct their own businesses as they pleased, and that the union were pushing into matters which did not concern them. The appellants further say, as I understand their case, that this unjustifiable intrusion was due to the union's desire to secure the assistance of the millowners towards the union's object, which was to get 100 per cent. membership in the textile workers, and thus there was no common object among the two main parties to the combination; each set had its own selfish object. In effect, it was said, the union were bribed by the millowners to victimize the appellants in their trade by the promise of help in the matter of the union membership, which was entirely foreign to the question of the importation of yarn. These considerations, it was said, constituted "malice" in law, even if there was no malevolence, and prevented the respondents from justifying the injury which they wilfully did to the appellants' trade, because they could not assert any legitimate interest of their union which was relevant to the action taken. Actual malevolence or spite was, it was said, not essential. There was no genuine intention to promote union interests by the stoppage of importation. The interference with the appellants' trade by stopping import of yarn was wilful and ultroneous action on the part of the union supported by no relevant union interest. It was malicious or wrongful because it was intentionally and unjustifiably mischievous, even though not malevolent.

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(1) [1925] A. C. 700, 730.

Before I refer to the authorities, there are some preliminary observations which I desire to make. I shall avoid the use of what Lord Bowen described as the "slippery" word "malice" except in quotations. When I want to express spite or ill will, I shall use the word malevolence. When I want to express merely intentional tortious conduct I shall use the word wrongful. As the claim is for a tort, it is necessary to ascertain what constitutes the tort alleged. It cannot be merely that the appellants' right to freedom in conducting their trade has been interfered with. That right is not an absolute or unconditional right. It is only a particular aspect of the citizen's right to personal freedom, and like other aspects of that right is qualified by various legal limitations, either by statute or by common law. Such limitations are inevitable in organized societies where the rights of individuals may clash. In commercial affairs each trader's rights are qualified by the right of others to compete. Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining. It is true that under the Combination of Workmen Act, 1800, it was a criminal offence for workmen to combine together for the purpose of securing higher wages or shorter hours of work or of controlling employers in the conduct or management of their business. That Act was repealed by the Acts of 1824 and 1825, but these Acts introduced various restrictions on the conduct of strikes. But as Lord Bramwell said in *Mogul Steamship Co.* v. *McGregor &*

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Co., Ld. (1), "a combination of workmen, an agreement among "them to cease work except for higher wages, and a strike in "consequence, was lawful at common law; perhaps not "enforceable inter se, but not indictable." In the report of *Reg.* v. *Rowlands* (2) (a criminal case, but the same principles apply in a civil suit), Erle J. directed the jury: "The law is "clear, that workmen have a right to combine for their own "protection, and to obtain such wages as they choose to agree "to demand. I say nothing at present as to the legality of "other persons, not workmen, combining with them to assist "in that purpose. As far as I know, there is no objection, in "point of law, to it." He added that while the law allowed them to combine for the purpose of obtaining a lawful benefit for themselves, it gave no sanction to combinations which had for their immediate purpose the hurt of another. I attach great value to that clear and simple statement, which has not been superseded but confirmed by the more elaborate later discussions. It is clear that this right of workmen cannot be generally exercised without interfering with the employers' free conduct of their own business. Erle J. added that either side had the right to study to promote their own advantage and to combine with others for that purpose. His summing up was quoted with approval by Bowen L.J. in *Mogul Steamship Co.'s* case (3), as applying equally to traders as to employers and workmen. It was also approved in the same case by Fry L.J.(4). The same principle is again stated in *Allen* v. *Flood* (5), *Quinn* v. *Leathem* (6), *Ware and De Freville, Ld.* v. *Motor Trade Association* (7), and in *Sorrell's* case (8). The language of Erle J. is certainly a clear statement of a far-reaching principle. The same idea is more elaborately enunciated by Lord Herschell in *Allen* v. *Flood* (9): " I understood it to be "admitted at the Bar, and it was indeed stated by one of the "learned judges in the Court of Appeal, that it would have "been perfectly lawful for all the ironworkers to leave their "employment and not to accept a subsequent engagement "to work in the company of the plaintiffs. At all events I "cannot doubt that this would have been so. I cannot "doubt either that the appellant [the trade union official]

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(1) [1892] A. C. 25, 47.

(2) (1851) 17 Q. B. 671, 686, n. (*b*) 2.

(3) 23 Q. B. D. 598, 618, 619.

(4) Ibid. 625.

(5) [1898] A. C. 1.

(6) [1901] A. C. 495.

(7) [1921] 3 K. B. 40.

(8) [1925] A. C. 700.

(9) [1898] A. C. 1, 129.

"or the authorities of the union would equally have acted "within his or their rights if he or they had 'called the men "'out.' They were members of the union. It was for them "to determine whether . . . . they would follow or not follow the "instructions of its authorities, though no doubt if they had "refused to obey any instructions which under the rules of "the union it was competent for the authorities to give, they "might have lost the benefits they derived from membership. "It is not for your Lordships to express any opinion on the "policy of trade unions, membership of which may undoubtedly "influence the action of those who have joined them. They "are now recognized by law; there are combinations of "employers as well as of employed. The members of these "unions, of whichever class they are composed, act in the "interest of their class. If they resort to unlawful acts they "may be indicted or sued. If they do not resort to unlawful "acts they are entitled to further their interests in the manner "which seems to them best, and most likely to be effectual." This statement was criticized adversely by Lord Lindley in *Quinn's* case (1), but in my opinion it states the law correctly.

It is thus clear that employers of workmen or those who like the appellants depend in part on the services of workmen, have in the conduct of their affairs to reckon with this freedom of the men and to realize that the exercise of the men's rights may involve some limitation on their own freedom in the management of their business. Such interference with a person's business, so long as the limitations enforced by law are not contravened, involves no legal wrong against the person. In the present case the respondents are sued for imposing the "embargo," which corresponds to calling out the men on strike. The dockers were free to obey or not to obey the call to refuse to handle the appellants' goods. In refusing to handle the goods they did not commit any breach of contract with anyone; they were merely exercising their own rights. But there might be circumstances which rendered the action wrongful. The men might be called out in breach of their contracts with their employer, and that would be clearly a wrongful act as against the employer, an interference with his contractual right, for which damages could be claimed not only as against the contract-breaker, but against the person who counselled or procured or advised the breach. This is the principle laid down in *Lumley* v. *Gye* (2), which

(1) [1901] A. C. 495, 537.

(2) (1853) 2 E. & B. 216.

Lord Macnaghten in *Quinn* v. *Leathem* (1), defined to be that "a violation of legal right committed knowingly is a cause "of action, and it is a violation of legal right to interfere with "contractual relations recognized by law if there be no "sufficient justification for the interference." That is something substantially different from a mere interference with a person's qualified right to exercise his free will in conducting his trade. A legal right was violated and that violation needed justification, if it could be justified. This distinction was drawn by the majority of the Lords in *Allen* v. *Flood* (2), who disapproved of the dicta in *Bowen* v. *Hall* (3) and *Temperton* v. *Russell* (4), that every person who persuades another not to enter into a contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such person. But in *Allen* v. *Flood* (2), this House was considering a case of an individual actor, where the element of combination was absent. In that case, it was held, the motive of the defendant is immaterial. Damage done intentionally and even malevolently to another, thus, it was held, gives no cause of action so long as no legal right of the other is infringed. That I take to be the English rule laid down by this House in *Bradford Corporation* v. *Pickles* (5), and in *Allen* v. *Flood* (2), though in *Sorrell* v. *Smith* (6) Lord Cave doubts the proposition and says that in general what is unlawful in two is not lawful in one. But this seems to be inconsistent with the express rulings in *Allen* v. *Flood* (2). Though eminent authorities have protested against the principle, it must, I think, be accepted at present as the law in England. The precise issue does not arise in this case, which is concerned with combination or conspiracy. I need not consider whether any qualification may hereafter be found admissible.

Thus for purposes of the present case we reach the position that apart from combination no wrong would have been committed. There was no coercion of the dockers. There were no threats to them. They were legally free to choose the alternative course which they preferred. In *Quinn* v. *Leathem* (1) a wide meaning was given to words like threats, intimidation or coercion, especially by Lord Lindley, but that was not the ratio decidendi adopted by the House.

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(1) [1901] A. C. 495, 510.
(2) [1898] A. C. 1.
(3) (1881) 6 Q. B. D. 333.
(4) [1893] 1 Q. B. 715.
(5) [1895] A. C. 587.
(6) [1925] A. C. 700, 713.

These words, as R. S. Wright pointed out in his book on Criminal Conspiracy, are not terms of art and are consistent either with legality or illegality. They are not correctly used in the circumstances of a case like this. In *Allen* v. *Flood* (1), *Ware and De Freville, Ld.* v. *Motor Trade Association* (2) and *Sorrell's* case (3), a more accurate definition was given. I should also refer to the admirable discussion by Peterson J. in *Hodges* v. *Webb* (4). There is nothing unlawful in giving a warning or intimation that if the party addressed pursues a certain line of conduct, others may act in a manner which he will not like and which will be prejudicial to his interests, so long as nothing unlawful is threatened or done. In Lord Buckmaster's words in *Sorrell* v. *Smith* (5): "A "threat to do an act which is lawful cannot, in my opinion, "create a cause of action, whether the act threatened is "to be done by many or by one." No doubt the use of illegal threats or the exercise of unlawful coercion would create by itself a cause of action, but there was nothing of the sort in this case.

The only ground in this case on which the appellants could establish a cause of action in tort is by establishing that there was a conspiracy to injure, which would take the case out of the general ruling in *Allen* v. *Flood* (1) and bring it within the exception there reserved, e.g., by Lord Herschell, when he said (6): "It is certainly a general rule of our law that an "act prima facie lawful is not unlawful and actionable on "account of the motive which dictated it. I put aside the "case of conspiracy, which is anomalous in more than one "respect." Lord Watson made a similar reservation (7). Lord Macnaghten (8) said that the decision in *Allen* v. *Flood* (1) could have no bearing on any case which involved the element of oppressive combination. These reservations were acted upon in *Quinn* v. *Leathem* (9), to which I shall refer later. That the decision in that case turned on conspiracy cannot now be doubted, especially after *Ware and De Freville, Ld.* v. *Motor Trade Association* (2) and *Sorrell's* case (3). The distinction between conduct by one man and conduct by two or more may be difficult to justify. Lord

(1) [1898] A. C. 1.
(2) [1921] 3 K. B. 40.
(3) [1925] A. C. 700.
(4) [1920] 2 Ch. 70.
(5) [1925] A. C. 700, 747.
(6) [1898] A. C. 1, 123.
(7) Ibid. 108.
(8) Ibid. 153.
(9) [1901] A. C. 495.

Sumner in *Sorrell's* case (1) puts the very artificial case of the owner of a large business who gave a small share to a partner and " conspired " with him. For practical purposes the position there is the same as if he had remained a sole trader. The fact that the sole trader employed servants or agents in the conduct of his business would not per se in my opinion make these others co-conspirators with him. The special rule relating to the effect of a combination has been explained on the ground that it is easier to resist one than two. That may appear to be true if a crude illustration is taken, such as the case of two men attacking another, but even there it would not always be true if, for instance, the one man was very strong and the two very weak. And the power of a big corporation or trader may be greater than that of a large number of smaller fry in the trade. This explanation of the rule is not very satisfactory. The rule has been explained on grounds of public policy. The common law may have taken the view that there is always the danger that any combination may be oppressive, and may have thought that a general rule against injurious combinations was desirable on broad grounds of policy. Again any combination to injure involves an element of deliberate concert between individuals to do harm. Whatever the moral or logical or sociological justification, the rule is as well established in English law as I here take to be the rule that motive is immaterial in regard to the lawful act of an individual, a rule which has been strongly criticized by some high legal authorities who would solve the apparent antinomy by holding that deliberate action, causing injury, is actionable, whether done by one or by several.

A conspiracy to injure involves ex vi termini an intention to injure, or more accurately, a common intention and agreement to injure. Both " intention " and " injure " need definition. The word " injure " is here used in its correct meaning of "wrongful harm," damnum cum injuria, not damnum absque injuria. That obviously raises the question, when is the harm wrongful ? " Intention " is generally determined by reference to overt acts and to the circumstances in which they are done. It is in this way that an intention to deceive, which is an essential element in the action of deceit, is ascertained. Lord Watson in *Allen* v. *Flood* (2) warns against the " loose logic "which confounds internal feelings with outward acts, and

(1) [1925] A. C. 700, 740.

(2) [1898] A. C. 1, 98.

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"treats the motive of the actor as one of the means employed "by him." Erle J., in the passage I have referred to in *Reg.* v. *Rowlands* (1), seems to have in mind an external object when he distinguishes combinations for the purpose of obtaining a lawful benefit for the combiners from combinations which have for their immediate purpose the hurt of another. I do not think that Erle J. in these words intended a contrast between what is immediate and what is remote. If he so intended, the later authorities would, I think, contradict such a view. A competitive combination of traders to undercut prices may be said to have the immediate result of excluding rivals from the trade, but if its real object is the ultimate increase of business and profits by the traders it is lawful: *Mogul* case (2). A perfectly lawful strike may aim at dislocating the employer's business for the moment, but its real object is to secure better wages or conditions for the workers. The true contrast is, I think, between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any such just cause. The courts have repudiated the idea that it is for them to determine whether the object of the combiners is reasonably calculated to achieve their benefit. The words "motive," "object," "purpose," are in application to practical matters difficult strictly to define or distinguish. Sometimes mere animus, such as spite or ill will, malevolence or a wanton desire to harm without any view to personal benefit is meant. But motive is often used as meaning purpose, something objective and external, as contrasted with a mere mental state. "Object" is, I think, the most appropriate word. How far malevolence is to be regarded as an essential element in the law of conspiracy has led to differences of opinion, particularly in *Sorrell's* case (3). Proof of malevolent feelings, coupled with proof that the combiners had in view no tangible benefit to themselves would clearly I think be enough to show that the combination was wrongful. But it does not follow that malevolence is a necessary element to constitute the tort. Lord Cave in *Sorrell's* case (4) stated the law, at least for purposes of that case, in two propositions. "(1.) A combination of two or more "persons wilfully to injure a man in his trade is unlawful "and, if it results in damage to him, is actionable. (2.) If

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(1) 17 Q. B. 671, 686.
(2) [1892] A. C. 25.
(3) [1925] A. C. 700.
(4) Ibid. 712.

"the real purpose of the combination is, not to injure another, "but to forward or defend the trade of those who enter into "it, then no wrong is committed and no action will lie although "damage to another ensues." This double proposition seems to me to be substantially complete and accurate, though it is no doubt in need of qualification; for instance, it is limited to trade and does not in terms refer to mixed objects. But while it seems to me to emphasize the contrast I have found throughout the cases, it does not mention malevolence. I do not think it differs in substance from Lord Dunedin's view in the same case (1). He states the contrast between a conspiracy to injure on the one hand and on the other a set of acts dictated by business interests. When he emphasizes that a conspiracy to injure involves mens rea, the guilty intention, he does not necessarily mean that malevolence is essential. Lord Buckmaster takes the same contrast between the case where the purpose of the combination is the deliberate injury of a third person and where it is the promotion of legitimate trade interests. Lord Sumner, however, seems, at least in part of his opinion, to regard proof of actual spite, malevolence or ill will as essential to the cause of action for conspiracy to injure. He draws a parallel from the law of defamation (2). "Just as defamatory words uttered on a "privileged occasion cease to be words which the speaker is "entitled to utter if he is actuated by express malice, so the "pursuit of one's own interests at a rival's expense which "pure commercial selfishness would justify, passes the limit "of legal right and enters the field of actionable wrongdoing, "if for that purity there is substituted independent malevolence "towards others." On the other hand he says (3): "I incline "to agree that the object or purpose of the aggressive action "of a combination is the principal thing to be considered," though he adds doubts and qualifications principally in reference to mixed motives.

On this question whether malevolence is a necessary element in conspiracy to injure there appears to be some opposition between Lord Sumner and Lord Cave, who not only leaves out that element in stating his two propositions, but in express terms says (4) that a motive of spite is not an essential element of the offence. Lord Atkinson agrees with Lord Cave. Lord Dunedin does not in terms expressly mention it. He is

(1) [1925] A. C. 700, 730.

(2) Ibid. 737.

(3) Ibid. 741.

(4) Ibid. 714.

content to rest upon mens rea, a desire to injure. Lord Buckmaster agrees generally with Lord Dunedin though in one place he says (1), that the onus is on the plaintiff to prove that the act was spiteful and malicious. I do not read these opinions as differing on the essential point that where the acts are per se lawful, the presence or absence of intention to injure is the determining feature, and that such an intention is rebutted by a finding that the combiner's real object was to advance their interests. On principle I am of opinion that malevolence is no more essential to the intent to injure, the mens rea, than it is to the intent to deceive. On practical grounds also I prefer that view. To leave to a jury to decide on the basis of an internal mental state, rather than on the facts from which intent is to be inferred, may be to leave the issue in the hands of the jury as clay to mould at their will. After all, the plaintiff has to prove actual damage which can only result from things done. Mere malevolence does not damage anyone. I cannot see how the pursuit of a legitimate practical object can be vitiated by glee at the adversary's expected discomfiture. Such glee, however deplorable, cannot affect the practical result. I may add that a desire to injure does not necessarily involve malevolence. It may be motivated by wantonness or some object not justifiable. As to the authorities, the balance, in my opinion, is in favour of the view that malevolence as a mental state is not the test. I accordingly agree with the appellants' contention that they are not concluded by the finding that the respondents were not malevolent. It thus becomes necessary to consider the further arguments on which the appellants base their claim to succeed.

I approach the question on the assumption that the appellants have to prove that they have been damnified by tortious action. They do not prove that by showing that they have been harmed by acts done by the respondents in combination, these acts being apart from any question of combination otherwise within the respondents' rights. It is not then for the respondents to justify these acts. The appellants must establish that they have been damnified by a conspiracy to injure, that is, that there was a wilful and concerted intention to injure without just cause, and consequent damage. That was the view accepted by Lords Dunedin and Buckmaster in *Sorrell's* case (1). Lord Sumner proposes the question without deciding it. But the form in which he states it seems to me to suggest the answer. It is not a question of onus of proof. It depends on what is the cause of action. The plaintiff has to prove the wrongfulness of the defendant's object. Of course, malevolence may be evidence tending to exclude a legitimate object or to establish a wrongful object.

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(1) [1925] A. C. 748.

(2) Ibid. 700.

I have been attempting to define the legal background of the tort, a conspiracy to injure, before I seek to express my opinion on the appellants' contentions. I have not sought to reconcile all that has been said on the question in the authorities. For various reasons, perhaps obvious enough, some due to the earlier combination laws, some perhaps influenced by personal predilections of some judges in the earlier years of this century, reconciliation of all the observations is impossible. But after all, law does not depend on balancing expressions, as R. S. Wright in his work on Criminal Conspiracy, at p. 51, wisely observed. I have attempted to state principles so generally accepted as to pass into the realm of what has been called jurisprudence, at least in English law, which has for better or worse adopted the test of self-interest or selfishness as being capable of justifying the deliberate doing of lawful acts which inflict harm, so long as the means employed are not wrongful. The common law in England might have adopted a different criterion and one more consistent with the standpoint of a man who refuses to benefit himself at the cost of harming another. But we live in a competitive or acquisitive society, and the English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor's own freedom, leaving the precise application in any particular case to the jury or judge of fact. If further principles of regulation or control are to be introduced, that is matter for the legislature. There are not many cases in which the court has had to consider these problems. Actions of this character are not of everyday occurrence like actions for negligence. I must however refer to the details of certain cases.

I shall first refer to *Quinn* v. *Leathem* (1), decided by this House on appeal from Ireland. In outline the facts were very simple. Leathem, a butcher, had been employing non-union labour. The policy of the union was that only its members should be employed. Leathem was willing that his men

(1) [1901] A. C. 495.

should join the union and offered to pay their fines and entrance money. The defendants, the union officials, refused that offer and said the men could not be admitted to the union but must walk the streets for twelve months. Leathem refused to discharge the men. A few months later he was warned that if he continued to employ non-union men, the men who worked for Munce, one of Leathem's customers, would be called out unless Munce ceased to take his meat from Leathem. Munce thought it more prudent to cease to get his meat from Leathem, who lost the benefit of his customer's trade. This was the damage claimed in the action in which a conspiracy to injure was alleged. I disregard the case of the man Dickie who was called out in breach of his contract with Leathem. Apart from the savage expressions used by the defendants and perhaps the desire of the defendants that the men should walk the streets for twelve months, and the circumstance that Leathem had offered to satisfy the union's demands, the case might well have been regarded as one in which ordinary measures had been taken to promote the union's interests by excluding non-union labour. In *Ware and De Freville, Ld.* v. *Motor Trade Association* (1), Scrutton L.J. pointed out the close parallel with *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (2), a striking case of " exclusive dealing " in trade affairs enforced by threats or warnings by the defendants in concert that they would withhold their custom from the salesmen if they sold meat to the plaintiff. The object was to limit competition. The decision in *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (2) was approved by this House in *Sorrell's* case (3) and also by Lord Lindley in *Quinn's* case (4). But there was in *Quinn's* case (4) the special evidence of vindictive purpose. It was thus a question for the jury to decide whether there was an intention to injure or an intention to promote the union's objects, or perhaps more exactly what was the predominant object. Fitzgibbon L.J., who tried the case, put to the jury the question (5): " Did "the defendants or any two or more of them maliciously "conspire to induce the plaintiff's customers or servants "named in the evidence or any of them not to deal with the "plaintiff or not to continue in his employment, and were "such persons so induced not to do so ? " The jury answered, yes. The judge told the jury (1) that "acts done with the "object of increasing the profits or raising the wages of any "combination of persons, such as the society to which the "defendants belonged . . . . by reasonable and legitimate "means, were perfectly lawful, and were not actionable so long "as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party." He put the usual and correct alternative between acts done to secure or advance the combiners' own interests and acts intended and calculated to injure the plaintiff in his trade. He told the jury that intention was to be inferred from acts and conduct proved. There is no report of the summing up as a whole. It is useless to speculate whether the jury might not have properly found that if the objects or motives were mixed the predominant motive or object was to advance the union's policy while the malevolent desire to punish Leathem was subordinate. It was for the jury to decide; they decided against the defendants, and there was evidence to support their verdict. Some may question whether they fully appreciated what were the actual interests or objects of a trade union. But this is fact, not law. In the Irish Court of Appeal, where the case is entitled *Leathem* v. *Craig* (2) the judgment which most appeals to me is that of Holmes L.J., which Lord Robertson adopted in toto in his speech in this House, and Lord Macnaghten approved. Holmes L.J. said that if there was illegality in a combination it must be looked for in the object proposed. He treated the finding of the jury as decisive.

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(1) [1921] 3 K. B. 40, 68.
(2) (1898) 35 S. L. R. 645.
(3) [1925] A. C. 700.
(4) [1901] A. C. 495, 539.
(5) Ibid. 497.

It seems to me that much of the discussion which has centred round *Quinn's* case (3) merely deals with the issue of fact, and either approves or disapproves of the justness of the jury's finding. But the decision of the House is of great importance as giving the authority of this House to the principle that a conspiracy to injure gives a cause of action. That rule was well established and had been applied in *Temperton* v. *Russell* (4), and approved by this House in *Allen* v. *Flood* (5). *Quinn's* case (3) was in fact the complement of *Allen* v. *Flood* (5). The latter case gave effect to the rule where there was no combination, the former to the rule where there was combination. Of the six Lords of Appeal who took part in the debate in *Quinn's* case (1) the ratio decidendi of five was based upon a conspiracy to injure. I refer to Lord Halsbury (2), Lord Macnaghten (3), Lord Shand (4), Lord Robertson (5), where he adopts Holmes L.J.; Lord Brampton (6). The views of these Lords are enough to decide what is the ratio decidendi adopted in this House. Lord Lindley (7) seems to base his judgment on coercion and threats by numbers, but without clearly defining what he means by these neutral terms which have since been elucidated in this House. I do not think it necessary further to consider the cross currents of observations which are found in some of the speeches. Lord Shand sums up his view (and, as it appears to me, the ratio decidendi of the House) very clearly and accurately (8): "Their [the defendants'] acts were wrongful "and malicious in the sense found by the jury, that is to say, "they acted by conspiracy, not for any purpose of advancing "their own interests as workmen, but for the sole purpose of "injuring the plaintiff in his trade." So understood, *Quinn's* case (9) does not help the appellants here unless they can get rid of the findings of the courts below. Before I examine the grounds on which they seek to do this I ought to refer to some other cases.

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(1) [1901] A. C. 495, 500.
(2) [1899] 2 I. R. 677.
(3) [1901] A. C. 495.
(4) [1893] 1 Q. B. 715.
(5) [1898] A. C. 1.

One is *Giblan* v. *National Amalgamated Labourers' Union* (10) where the jury found that the defendants' acts in preventing the plaintiffs from getting employment were done in the case of the one to prevent him from getting or retaining employment, and in the case of the other to compel him to pay arrears of defalcations of which he was guilty. The facts were somewhat complicated. As Lord Herschell pointed out in *Allen* v. *Flood* (11), the use of the word "punishment" may be misleading; it may mean mere vindictive vengeance or it may mean an intention to deter others from similarly offending. Equally the desire to enforce repayment of defalcations may be actuated by either of the same motives, to say nothing of desire to get the money. It is clear that the jury took the view more adverse to the defendants. Much that was said by the lords justices in the case would require careful consideration in view of earlier and later decisions of this House.

(1) [1901] A. C. 495.
(2) Ibid. 495, 505.
(3) Ibid. 511.
(4) Ibid. 513.
(5) Ibid. 532.
(6) [1901] A. C. 527, 258.
(7) Ibid. 495, 539.
(8) Ibid. 515.
(9) Ibid. 495.
(10) [1903] 2 K. B. 600.
(11) [1898] A. C. 1, 131.

Romer L.J., however, wisely observes (1) that in determining whether the injurious action is "justified" regard must be had to the circumstances of each case as it arises and that it is not practically feasible to give an exhaustive definition of the word to cover all cases. The facts in *Giblan's* case (2) were so peculiar that I cannot derive any general guidance from it. I may note in particular that the jury found that the trouble did not arise because the union men objected to work with the plaintiffs. I cannot find any analogy between the facts in that case and the facts as found in the present case.

On the other hand, two later cases show how far the courts have gone in upholding the rights of persons to freedom to pursue their own interests in their trade even at the cost of seriously impeding the freedom in a practical sense of other persons in their trade. Perhaps the most striking case of this nature is *Ware and De Freville, Ld.* v. *Motor Trade Association* (3), approved by this House in *Sorrell's* case (4) and later applied in *Thorne* v. *Motor Trade Association* (5). The defendants were an association of motor car manufacturers who adopted a scheme and rules for maintaining fixed prices for their goods. These prices were published. If any person departed from these published prices his name was put on a "stop list" and thereupon no member of the association was to supply him. Further, if any person did supply him, that person's name would also be placed on the "stop list" and he would be similarly pilloried. Persons on the "stop list" were, however, allowed to purge their offence by paying a fine if the association accepted it. The plaintiff, a motor dealer who was not a member of the association, had been placed on the "stop list" in accordance with the scheme. The scheme was a most ruthless and efficient system aimed at securing the mutual benefit of the associated traders at whatever loss or inconvenience to outsiders. The plaintiff complained that all he wanted was to exercise his lawful freedom to buy and sell cars as he desired. It was contended that the system adopted by the defendants went beyond any previous decision. The defendants, it was submitted, were saying, "If you continue to deal with the plaintiff you "shall not only cease to deal with us but we shall take steps

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(1) [1903] 2 K. B. 600, 618.

(2) Ibid. 600.

(3) [1921] 3 K. B. 40.

(4) [1925] A. C. 700.

(5) [1937] A. C. 797.

"to prevent others from dealing with you." But the Court of Appeal held that no legal wrong was committed, because the defendants had done nothing unlawful, and the combination was not a wrongful conspiracy because its object was not to injure, but was the lawful object of promoting their business interests, as they understood them, by preventing price cutting and securing price maintenance. The elaborate system was devised solely with that object. The Court of Appeal rejected the contention that the method adopted amounted to coercion or threats. On this latter topic much the same opinion was expressed by this House in *Sorrell* v. *Smith* (1), already referred to by me. Apart from the general exposition of the law of civil conspiracy to injure which it contains it is important in dealing with the present appellants' submissions because it placed on a wide basis the business interests, protection or advancement of which would prevent it being held that the defendants had acted with intention to injure the plaintiff. The defendants, an association of newspaper proprietors, in the course of a dispute between two rival associations of newspaper dealers, had intervened to support the policy of one association by stopping supplies to the plaintiff, a retail dealer who had adhered to the side of the other. Russell J., as he then was, the trial judge, held that the defendants had no justification for interfering with the plaintiffs' freedom of trade, because they had no direct interest in the conflict between the two associations. In Lord Sumner's words (2) the judge's view was " that the "defendants were well meaning busybodies, who intimidated "third parties and so meddled with the plaintiff's business "in a matter which was no business of theirs" because, as he held, they wanted a controlling decision in the dispute. The Court of Appeal and this House reversed the decision of the judge on the short ground that the real purpose of the newspaper proprietors was to promote the circulation of their papers, and that they did so by lawful means.

I think this line of reasoning applies here to answer the appellants' contention that the respondents or the union had no direct interest in the importation of yarn. On the facts found, rightly as I think, they were of opinion that the prosperity of the industry in Harris tweed was jeopardized by the importation. It is not for the court to decide whether this opinion was reasonable or not. It was a genuine opinion.

(1) [1925] A. C. 700. (2) Ibid. 731.

It cannot be said that it was a mere sham intended to cloak a sinister desire to injure the importers. The respondents had no quarrel with the yarn importers. Their sole object, the courts below have held, was to promote their union's interests by promoting the interest of the industry on which the men's wages depended. On these findings, with which I agree, it could not be said that their combination was without sufficient justification. Nor would this conclusion be vitiated, even though their motives may have been mixed, so long as the real or predominant object, if they had more than one object, was not wrongful. Nor is the objection tenable that the respondents' real or predominant object was to secure the employers' help to get 100 per cent. membership of the union among the textile workers. Cases of mixed motives or, as I should prefer to say, of the presence of more than one object, are not uncommon. If so, it is for the jury or judge of fact to decide which is the predominant object, as it may be assumed the jury did in *Quinn's* case (1), when they decided on the basis that the object of the combiners was vindictive punishment, not their own practical advantage. A curious instance of mixed motives or objects is taken by Andrews J., in his interesting judgment in the Divisional Court in *Leathem* v. *Craig* (2), from *Kearney* v. *Lloyd* (3), where the defendants were parishioners who had combined to withhold their subscriptions from the incumbent, partly, as the jury found, with the intention of promoting the religious interests of the parish, and partly with the intention of obliging the incumbent to resign. Andrews J. expressed the view that the former was the main and ultimate object. The case, however, was eventually decided on other grounds.

I may here note that the doctrine of civil conspiracy to injure extends beyond trade competition and labour disputes. *Thompson* v. *New South Wales Branch of the British Medical Association* (4) shows that it may extend to the affairs of a profession, as was expressly stated in that case in the judgment of the Privy Council. By way of contrast, *Gregory* v. *Duke of Brunswick* (5), may be regarded as a striking illustration of what might be held to constitute a conspiracy to injure; what was alleged was a conspiracy to hiss an actor off the stage in order to ruin him. To what legitimate interests other than those mentioned the general doctrine may extend I do not here seek to define, since beyond question it extends to the present case, whether the object of the action were the prosperity of the industry or the obtaining 100 per cent. membership. But the objects or purposes for which combinations may be formed are clearly of great variety. It must be left to the future to decide on the facts of the particular case, subject to the general doctrine, whether any combination is such as to give rise to a claim for a conspiracy to injure.

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(1) [1901] A. C. 495.
(2) [1899] 2 I. R. 667, 674.
(3) 26 L. R. Ir. 268.
(4) [1924] A. C. 764, 771.
(5) (1844) 6 M. & G. 953.

But the object of securing 100 per cent. union membership, if it were operative in inducing the respondents to combine with the employers, was relied on by the appellants on other grounds as vitiating the combination. It was objected that there could be no combination between the employers and the union because their respective interests were necessarily opposed. I think that is a fallacious contention. It is true that employers and workmen are often at variance because the special interest of each side conflicts in a material respect as, for instance, in questions of wages, conditions of hours of work, exclusion of non-union labour. But apart from these differences in interest, both employers and workmen have a common interest in the prosperity of their industry, though the interest of one side may be in profits and of the other in wages. Hence a wider and truer view is that there is a community of interest. That view was acted upon in the present case in regard to the essential matter of yarn importation. As to the separate matter of the union membership, while that was something regarded as important by the respondents it was probably regarded by the employers as a matter of indifference to them. It was, in any case, a side issue in the combination even from the respondents' point of view. I may add that I do not accept, as a general proposition, that there must be a complete identity of interest between parties to a combination. There must, however, be sufficient identity of object, though the advantage to be derived from that same object may not be the same.

The appellants have further contended that the "deal" referred to in the respondent Veitch's letter was a bargain by which the union sold to the employers the dockers' aid in return for the employers' aid in regard to union membership. In other words, the contention was that the respondents or the union were bribed and were mercenaries, not interested in the embargo except for the reward which was in its nature unrelated to the embargo. The facts, however, were not as the contention assumes, so that I need not discuss whether a party to a combination whose interest was merely separate and mercenary, could ever be held to have a legitimate interest or justification for harm done in pursuance of the combination. I need add merely a few words on the objection that the embargo was the act of the dockers for the benefit, not of themselves, but of the textile workers. It is enough to say that both sections were members of the union, and there was in my opinion a sufficient community of interest even if the matter is regarded from the standpoint of the men, as individuals, and not from the standpoint of the respondents, who were the only parties sued. Their interest, however, was to promote the advantage of the union as a whole.

In my opinion, the judgment appealed from should be affirmed and the appeal dismissed.

LORD PORTER. My Lords, the circumstances relevant to be considered in this case extend over a considerable period and the conclusions to be drawn from them demand a close scrutiny of the evidence. I need not state the facts; but I must set out the inferences which have been drawn from them and consider whether those arrived at by the courts below and particularly by the Lord Ordinary, have been shown to be wrong. Apart, however, from the facts, the arguments have ranged over a wide area of somewhat obscure law as to which so far as it is necessary your Lordships must find a solution. In a matter so difficult, however, I should not feel justified in expressing a concluded opinion upon any matter which is not essential for the determination of the case. I propose therefore to state with what accuracy I can the exact findings upon which I think a conclusion of law has to be pronounced.

It is unnecessary to emphasize the principle so often recognized by your Lordships, that in all cases where facts have to be reviewed, it is undesirable that the findings of the courts below should be disturbed by a Court of Appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend upon the demeanour of the witnesses and the impression formed by a tribunal which has seen them and can judge of their honesty and accuracy. In the present case the court had to determine the purpose, motive, intention, call it what you will, of Mr. Veitch and Mr. Mackenzie. I cannot find that the Lord Ordinary, or indeed the Inner House, thought either of them untruthful or dishonest. It would have been possible to judge them to be men who clearly foresaw the injury which their acts would produce and to have intended that injury, or to have thought them muddle-headed, obstinate and prejudiced, but still honestly desirous of doing what they considered beneficial to their trade union and anxious only to promote its interests, even though their acts might be prejudicial to some or all of the employers of the labour which they represented. Both courts took the latter view. One cannot be too logical in these matters or expect a defender to have an exact apprehension of the consequences of his acts or clearly to appreciate how the methods he adopts for effecting the end at which he aims, will work. His action may inevitably cause injury, yet that may not be his object. The case which is under consideration seems to me to be pre-eminently one in which an appellate tribunal should be guided by the opinion of the judge who saw and heard the witnesses and I do not find myself qualified to criticize or correct his conclusions as to the purpose which the defenders had in mind in following the path along which they travelled.

I should allow myself more latitude in dealing with the question whether there was a combination between the millowners or some of them and the two defenders sued, because the material for judgment is, I think, more abundant and because the Inner House has taken a view contrary, it is true, to that of the Lord Ordinary, but still one which must be shown to your Lordships to be wrong before it is interfered with. Having these considerations in mind, I find myself unable to differ from the Lord Ordinary when he concludes that there was no conspiracy to injure, and if for my own part I had to decide the further question whether a combination between millowners and defenders had been proved, I should not feel justified in forming an opinion contrary to his, but, in agreement with the opinion already expressed by the Lord Chancellor, should not consider this combination established. I am the more emboldened to express this view as I think it has the support in the Inner House of the Lord Justice Clerk and that Lord Wark, if he had himself had to determine it, would have been of the same opinion, though undoubtedly Lord Fleming and Lord Mackay take the other view. But the Lord Justice

Clerk thought there was some kind of understanding more or less defined between Mr. Veitch and Mr. Skinner to the effect that if the union took action and imposed an embargo against the importers of yarn, the union in turn would be assisted by the millowners to get their 100 per cent. membership, and I understand some of your Lordships to agree that the wider combination has been established. I am therefore prepared to treat the case upon that footing.

If the meaning of a combination to injure were plain and if a finding that it had not been proved were enough, the view that there had been no combination to injure would be conclusive of the case. But as both the meaning of the phrase and the question whether a mere absence of intention to injure is all that is required to absolve the defenders from liability, are both in dispute, it is first of all necessary to state exactly what I believe the finding of the Lord Ordinary to have been. It is, I think, set out succinctly in the following paragraph (1): "In the present case the immediate purpose "of Mr. Veitch and Mr. Mackenzie was to force producers to "come to an agreement regarding the selling price of tweed "and the exclusive use of island spun yarn. The means "adopted necessarily inflicted injury on the petitioners. But "was the infliction of injury Mr. Veitch's motive? Lord "Dunedin in *Sorrell* v. *Smith* (2) suggested a test as follows. "' Was such a purpose the real root of the acts that grew from "' it, or was the true motive of the acts something else, such "' as for instance, the furtherance of the defendant's own "' business?' Applying this test the answer must be in the "negative. There is no evidence that Mr. Veitch had evinced "any malice or ill will towards any of the petitioners or that "he was prompted by a desire to destroy the trade of any "persons who were employing weavers and paying them the "union rate of wages. The purpose at the root of his action "was to advance the position of the union and its members, "however mistaken he may have been in the means he adopted "to secure that end. It may be that the benefits hoped to "be obtained would have been an ultimate and not an "immediate consequence of the action taken, but I do not "think it would have been any more remote than in the cases "of *Sorrell* v. *Smith* (3) and *Ware and De Freville, Ld.* v. *Motor* "*Trade Association* (4)." There is ample evidence for this finding and although Mr. Veitch's testimony was at times confused and inconsistent, its effect was a matter for the learned judge. I find no attack upon the substantial honesty of this witness either by him or by the Inner House though the lack of consideration shown is severely criticized by both.

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(1) 1940 S. C. 141, 146, 147.

(2) [1925] A. C. 700, 717.

(3) [1925] A. C. 700.

(4) [1921] 3 K. B. 40.

The views of the Inner House are not dissimilar. I may quote from the Lord Justice-Clerk and from Lord Fleming. The former says: "Moreover, there are a number of circum-"stances that point to Mr. Veitch having acted in good faith. "He was a trusted and responsible official. He had no quarrel "with any of the petitioners; there is nothing to suggest that "he had ill will towards anyone. I regard the suggestion that "he was out to ruin the importers as entirely ill-founded. "His letter to Mr. Mackenzie of January 28 shows that he "was prepared to meet them and discuss the position. There "is not the slightest trace of personal ill will or spite; I doubt "if he knew any of them personally. The attainment of "100 per cent. trade union membership was the declared "policy of his trade union. From 1935 onwards the officials "of the union had made it clear that they regarded price-"cutting as something that would be hurtful to the interests "of the workers in the industry, and that they would not "hesitate to take direct action to prevent it. I attach the "greatest weight to the fact that Mr. Veitch instructed an "embargo against Mr. Macdonald, the largest, or one of the "largest millowners in the island—there is no suggestion that "this was a conspiracy to injure—as showing that he genuinely "believed that price-cutting would be gravely prejudicial to "the interests of his men. Also it had been represented to "Mr. Veitch by Mr. Skinner, particularly in his letter of "January 6, that the continued importation of yarn was "responsible for the reluctance of many yarn purchasers to "bind themselves to a price agreement and that the price of "yarn as affected by the importation would 'seriously affect' "their ability to maintain existing wage rates. There is no "suggestion that the dockers were coerced or intimidated "into taking action. They were consulted and were unanimous "in their decision—presumably because they were satisfied "where their true interests lay. Taking all these facts "together, I find it impossible to draw the conclusion that "Mr. Veitch was acting with an intent to injure. On the "contrary, I am satisfied, and I hold in fact, that he was "acting in the honest belief that the step was justified in "furtherance of the interests of his own members and the "industry as a whole." (1). Lord Fleming's words are: "Then there is the circumstance that both the parties had "the same interest in the matter. To exclude mainland yarn "would give the island millers a monopoly of the supply of yarn, "and Mr. Veitch's view was that the prohibition of mainland "yarn would be to the benefit of the workers in the industry." And again: "I feel satisfied that Mr. Veitch held sincerely "and strongly the view that the continuance of unrestricted "importation of mainland yarn would, sooner or later, prove "harmful to the members of the union, and that in the absence "of an agreement between the millowners and the importers, "the best policy for the union to adopt was to exclude it from "the island if it could. Mr. Macrae, who knew the whole "history of the industry, and was interested in it because it "involved the welfare of many members of his congregation, "also held this view, and I do not think it can be said to be "an unreasonable view. At all events it cannot be said that "it was so unreasonable as to justify an inference that there "was some other ulterior reason for Mr. Veitch's decision. "What lay at the root of the opposition to the importation "of mainland yarn on the part of Mr. Veitch and Mr. Macrae "seems to have been the idea that the whole process of making "wool into Harris tweed should be retained as far as possible "as an island monopoly for the benefit of the workers on the "island. The exclusion of mainland yarn would not only "give the island a monopoly of the whole process of manufacture, but would also tend to make the practice of price-"cutting more difficult. All tweed manufactured on the "island would qualify for the 'stamp,' and would not have "to face competition from Harris tweed woven in the island, "but from yarn not spun on the island. If, as I think, Mr. "Veitch sincerely held views of that kind, I find it difficult "to attribute his actings to anything else than a bona fide "desire to advance the interests of the members of his union." Lord Wark's reasoning does not differ from that of his brethren. His conclusion is expressed as follows (1): "Taking the "respondents in turn, I begin with Mr. Mackenzie. I cannot "find anything in the evidence to show, or even to suggest, "that he was inspired by any motive other than the desire "to forward what he bona fide believed to be the interests "of the members of his union. The same is true of Mr. Veitch.

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(1) 1940 S. C. 141, 156. Ibid. 172.

"There is no evidence that I can find of any ill-will against "any of the petitioners. It does not appear that he had "ever met any of them. His sole concern with them, in my "view, was to prevent them acting in such a way as would, "in his honest opinion and belief, injure the interests of the "members of the union: and, in my judgment, his only "motive in acting as he did was to advance these interests, "or at least to prevent injury to them. I cannot doubt, "upon the evidence, that Mr. Veitch honestly believed that "a continuance of the importation of mainland yarn would "bring down tweed prices and, with them, the wages of the "spinners and weavers." As I am discussing the case on the footing that there was a combination to which Mr. Skinner at least and possibly also some of the millowners were parties, I omit to stress the still stronger view expressed by Lord Fleming as to Mr. Mackenzie's activities (1): "The latter," he says, "was throughout a mere servant, his function being "in the main limited to carrying out Mr. Veitch's instructions "and doing routine work. The grounds for holding him guilty "of any intention to injure are much weaker than in Mr. "Veitch's case."

I have quoted somewhat fully from the opinions expressed because having regard to the arguments addressed to your Lordships I think it necessary to ascertain exactly what purpose the courts below imputed to those who have been held to have combined. Both I think found that the stoppage of the importation of mainland yarn was effected because Veitch and Mackenzie at any rate thought it in the interest of their workers to do so. Both also, I think, believed each of the defenders to hope that the manufacturers, millowners and non-millowners, would come to an agreement amongst themselves, and when that hope failed, put the strongest pressure they could upon the dissentient employers by refusing to handle their material, whether in the shape of yarn or the finished or unfinished product. The immediate purpose of the combination in this view was to prevent the importation of mainland yarn and to bring about an agreement amongst the employers to use only that spun upon the island, the motive of the defenders being thereby to prevent the danger of competition which they feared might cause a diminution of wages and to bring about a state of affairs in which a 100 per cent. membership of the union would be attained in the ranks of the spinners and of the weavers—the motive of the millowners to increase their profits and perhaps to eliminate competition in spinning.

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(1) 1940 S. C. 141, 161.

No doubt the result of the embargo was necessarily to injure those against whom it was exercised, but that was not found to be its purpose. Its object as found by the Lord Ordinary was to further the defenders' own legitimate business, and if that was their intention I should not consider them participants in an actionable conspiracy even though the inevitable result of the action which they took would be to ruin the importers of mainland yarn. This is the view of Holmes J. in *Vegelahn* v. *Guntner* (1) when he says: "The fact that the immediate "object of the act by which the benefit to themselves is to be "gained is to injure their antagonists does not necessarily "make it unlawful, any more then when a great house lowers "the price of certain goods for the purpose, and with the effect, "of driving a smaller antagonist from the business." These observations are no less weighty though delivered in a dissentient judgment. They were approved by Lord Cave in *Sorrell* v. *Smith* (2), and by Scrutton L.J. in *Ware and De Freville, Ld.* v. *Motor Trade Association* (3). They are also in conformity with the principles expressed in *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (4), which preceded it and are supported by the view of the majority of your Lordships' House in *Allen* v. *Flood* (5), which was decided two years later. In the last named case Lord Herschell speaking of the *Mogul* case (4), said (6): "In that case the very object of the "defendants was to induce shippers to contract with them "and not to contract with the plaintiffs, and thus to benefit "themselves at the expense of the plaintiffs, and to injure "them by preventing them from getting a share of the carrying "trade. Its express object was to molest and interfere with "the plaintiffs in the exercise of their trade. It was said "that this was held lawful because the law sanctions acts "that are done in furtherance of trade competition. I do "not think the decision rests on so narrow a basis, but rather "on this, that the acts by which the competition was pursued "were all lawful acts." The general proposition has been summed up by Scrutton L.J. in *Ware and De Freville, Ld.* v. *Motor Trade Association* (3) as follows: "I take *Allen* v.

(1) (1896) 167 Mass 92.
(2) [1925] A. C. 700, 714.
(3) [1921] 3 K. B. 40, 67.
(4) [1892] A. C. 25.
(5) [1898] A. C. 1.
(6) Ibid. 140.

"*Flood* (1) and *Bradford Corporation* v. *Pickles* (2) to decide "that an act otherwise lawful, though harmful, does not become "actionable by being done maliciously in the sense of with a "bad motive or with intent to injure another . . . . I take "the *Mogul* case (3) as deciding that a combination to do "acts, the natural consequence of which was to injure another "in his business, was not actionable if those acts were not "otherwise unlawful, such as assaults or threats of assaults, "and were done in furtherance of the trade interests of those "combining. I understand *Quinn* v. *Leathem* (4) to decide "that a combination to injure another in his trade and "business, not in furtherance of the trade interests of those "combining but out of spite against the person injured is "actionable." This is a summing up of the principles to be deduced from the so-called trilogy of cases upon conspiracy, and I think it is a correct one. It has since received support from the reasoning upon which your Lordships' House decided *Sorrell* v. *Smith* (5).

If this be their result *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (3) and *Allen* v. *Flood* (1) are consistent and easily comprehensible. More difficulty is to be found in explaining *Quinn* v. *Leathem* (4). Why should a combination to injure be actionable, whilst action taken by a single person for that purpose and that purpose only is permissible ?

In *Sorrell* v. *Smith* (5) Lord Cave L.C. thought the point an open one and Lord Sumner considered it at least not free from doubt, but the view that a combination to do acts injurious to others is actionable, whereas the act of a single individual is not, is, I think, supported by the greater weight of authority. Lords Field and Hannen in the *Mogul* case (3), are of this opinion, and in *Allen* v. *Flood* (1) Lords Watson (6), Herschell (7), Macnaghten (8), Lord Shand (9), Lord Davey (10), who with Lord James constituted the majority of the House—all indicated that a conspiracy to injure might give a good cause of action, where similar action on the part of an individual would not. Scrutton L.J. in *Ware and De Freville, Ld.* v. *Motor Trade Association* (11) finds difficulty in accounting for the difference. One not uncommon explanation is that a combination may exert undue pressure where one person will not, but it is not very satisfactory. In the first place it is not necessarily true and, in the second, to exert pressure is not unlawful. But there is an earlier question. Whether there be combination or not, it may be a criminal offence and an actionable wrong to induce another to do what is unlawful or to do what is lawful by unlawful means. The phraseology is first to be found in *Rex* v. *Jones* (1) and has again and again been repeated both in criminal and civil cases though in the former it may be a limitation and not a definition. In criminal cases Fitzgerald J. puts the principle in *Reg.* v. *Parnell* (2) in the following words: "Conspiracy has been aptly "described as divisible under three heads: (1.) Where the end to "be obtained is in itself a crime; (2.) Where the object is lawful "but the means to be resorted to are unlawful; (3.) and where "the object is to do an injury to a third party or to a class, "though if the wrong were effected by a single individual it "would be a wrong but not a crime."

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(1) [1898] A. C. 1.
(2) [1895] A. C. 587.
(3) [1892] A. C. 25.
(4) [1901] A. C. 495.
(5) [1925] A. C. 700.
(6) [1898] A. C. 1, 108.
(7) Ibid. 129.
(8) Ibid. 153.
(9) Ibid. 168.
(10) Ibid. 172.
(11) [1921] 3 K. B. 40.

And in *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (3), Lord Watson says: "I apprehend that in order to substantiate "their claim, the appellants must shew, either that the object "of the agreement was unlawful, or that illegal methods were "resorted to in its prosecution." In Fitzgerald J.'s definition even the third heading postulates the existence of a civil wrong, and in recent times I do not think that it has been held criminal merely to combine to injure a third party provided no unlawful means are used or contemplated and it is doubtful whether such a combination ever was criminal: see Wright on Criminal Conspiracy (1873), p. 41. It is true that in certain classes of case, e.g., where masters and workmen or trade are concerned, it was at one time held criminal to agree not to sell under fixed prices or not to work under certain prices (see *Rex* v. *Eccles* (4)), but the doctrine is not one to which, apart from statutory prohibition, any court to-day is likely to subscribe.

There may, however, be combinations which are criminal, though entered into for purposes which would not be criminal if done by an individual, but whether this be so or not it is now established that a conspiracy, the object of which is to injure a third person, is an actionable wrong. *Quinn* v. *Leathem* (5), and *Sorrell* v. *Smith* (1) in your Lordships' House are sufficient authority for this proposition. Why it has been so held is not, I think, clear. That such a combination may be actionable had, as I have indicated, already been recognized by at least five of the members of your Lordships' House who were amongst the majority in *Allen* v. *Flood* (2) and has again been recognized in *Sorrell* v. *Smith* (1). The point is now too well established to be the subject of controversy. In Lord Dunedin's view as expressed in the last mentioned case a conspiracy to injure is a criminal offence and therefore either the object aimed at or the means used (the noble Lord uses both expressions) were illegal. It may be so or it may be, as Lord Sumner suggests, that a combination to injure is a form of intimidation or again it may be that the doctrine is a survival of the view formerly held as to the illegality of combinations to raise wages or interfere with trade or of the more paternal view expressed on a different matter by Lord Mansfield in *Jones* v. *Randall* (3): "Whatever is contra bonos "mores est [sic] decorum, the principles of our law prohibit, "and the King's Court, as the general censor and guardian of "the public manners, is bound to restrain and punish." In any case it is undoubted law.

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(1) (1832) 4 B. & Ad. 345.

(2) (1881) 14 Cox C. C. 508, 513.

(3) [1892] A. C. 25, 41.

(4) (1783) 1 Leach 274.

(5) [1901] A. C. 495.

Whether it is necessary that the object of the defenders should be solely to gain an advantage for themselves or whether their motives may be mixed provided the main or substantial motive is their own gain is not so clear. Lord Dunedin in *Sorrell* v. *Smith* (1) apparently thought it enough that the dominating motive should be to benefit oneself. On the other hand in *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (4), Lord Hannen raises the question what would happen if the evidence had shown that the object of the defendants was a malicious one, namely to injure the plaintiffs, whether the defendants should be benefited or not, but since in that case as in this their sole motive was to secure certain advantages for themselves, leaves the question unanswered. Lord Watson, in the latter case, says (5): "If the respondents' combination "had been formed not with a single view to the extension "of their business and the increase of its profits but with "the main or ulterior design of effecting an unlawful object a "very different question would have arisen." Lord Parker

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(1) [1925] A. C. 700.
(2) [1898] A. C. 1.
(3) (1774) Lofft. 383, 385.
(4) [1892] A. C. 25, 59.
(5) [1892] A. C. 42.

H. L. (Sc.)

1941

CROFTER HAND WOVEN HARRIS TWEED CO. *v.* VEITCH.

Lord Porter.

in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co., Ld.* (1) speaks of "the right of combining with others in a common course of action, provided "such common course of action is undertaken with a single "view to the interests of the combining parties and not with "a view to injure others"; and in *Sorrell* v. *Smith* (2) Lord Sumner expresses himself as not prepared to admit that the addition of personal animosity to a desire to benefit oneself makes actionable that which without the animosity would not be so, but confesses himself unable to say at what point the intention to injure overweighs the scale so as to render the confederates liable for the damage which they do in spite of the private advantage which they hope to obtain.

The answer may be that given by Lord Dunedin in *Sorrell* v. *Smith* (2), namely, that one must judge broadly as a jury would judge, and so determine the predominant purpose. After all, the task is no more difficult than that which faces them in every criminal case—to determine whether there is mens rea or not. Nevertheless if I thought that in the present case the object of the parties to the combination was to ruin the appellants, even though they hoped thereby each to gain an advantage for himself, I should desire to consider the matter further before deciding that the respondents were not liable, but I do not think that such a case has been proved. The Lord Ordinary and Inner House have not so found. The direct object was to force an agreement and to stop the importation of mainland yarn, both of which were, as found by the courts below, honestly believed to be of direct benefit to the defenders' trade union. No question of indirect purpose comes in issue. The result of the action taken might be to ruin the importers of mainland yarn, and it might be recognized that this was a possible or even probable outcome, but that was not the purpose of those who combined. Each desired only to further his own interests.

If this view of the facts prevails, and it is recognized, as I think it must be since the decision in the *Mogul* case (3), that men are entitled to pursue their own advantage even though the natural and inevitable result be the ruin of others, the pursuers' case is at an end, but in deference to the forcible arguments addressed to us on behalf of the appellants and in view of the difficulties of the subject, I must add some further observations and qualifications to the views which I have expressed.

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(1) [1913] A. C. 781, 797.

(2) [1925] A. C. 700, 729, 742.

(3) [1892] A. C. 25.

One of the difficulties in the law of actionable combination is to decide what purposes are to be looked at in determining whether the combination is illegal or not. This problem is perhaps touched upon by Lord Cave in *Sorrell* v. *Smith* (1) when he speaks of the purpose of a threat being to forward trade interests and not wilfully and ultroneously to injure the trade of another, by which I think he means not wilfully to injure the trade of another save for the purpose of forwarding one's own. In other words, is it enough that the substantial object of the defenders was not to injure the pursuer, or must they go further and must it be established in some way, either by positive evidence on behalf of the defenders or lack of evidence on behalf of the pursuer, that they were following some interest of their own? In *Sorrell* v. *Smith* (1) Lord Sumner left the question open, though he suggests that the defenders must not be intermeddling busybodies. Lord Dunedin took the view that it was enough if they did not set out to injure the pursuer and regarded evidence that their own advantage was involved merely as tending to prove that their object was not to injure. Lord Cave did not in terms deal with the question, but the framework of his first proposition, which I quote below, suggests that the defenders must have their own end to gain. It is, I think, true to say that in all the cases which have dealt with this subject the contrast is drawn between a desire to injure on the one hand and the pursuit of the defenders' interests on the other. Nowhere except in Lord Dunedin's speech in *Sorrell* v. *Smith* (1) is the mere fact that the defendant's object was not found to be a desire to injure held to exonerate them from liability. It is, I think, always added that their purpose was to gain an advantage for themselves. Lord Sumner indeed asks (2), what other motive can there be in such a matter beyond selfishness and malice except, indeed, mere irresponsible wantonness. So far, however, no case has decided, and it has not been necessary to decide, whether confederates who have combined not for the purpose of doing an injury but with no object of their own to gain are or are not liable to those against whom they have combined.

The present case, like those which preceded it, does not require a solution of this problem. Throughout the defenders

(1) [1925] A. C. 700, 714.

(2) Ibid. 739.

acted in what they believed to be the interest of their trade union. But assuming that the defenders would only be justified in pressing their own selfish aims, is every personal advantage which accrues to them by reason of their action a sufficient excuse or is something more intimately and directly connected with their business interests required—something which will help their trade or improve the position of their trade union? Must it be something, as Scrutton L.J. says in *Ware and De Freville, Ld.* v. *Motor Trade Association* (1), "intended to secure the interests of the confederates in their "trade by reasonable and legitimate means"—by which I understand him to mean by lawful means?

That business in this connection is not confined to trade has been insisted upon in *Allen* v. *Flood* (2), and in *Bradford Corporation* v. *Pickles* (3) the principle was said not to be confined to rights of property but to be equally applicable to the exercise by an individual of his other rights.

The quotation most frequently made in this connection is the well-known passage in the speech of Lord Cave L.C. in *Sorrell* v. *Smith* (4). "I deduce as material for the decision "of the present case two propositions of law, which may be "stated as follows:—(1.) A combination of two or more persons "wilfully to injure a man in his trade is unlawful and, if it "results in damage to him, is actionable. (2.) If the real "purpose of the combination is, not to injure another, but "to forward or defend the trade of those who enter into it, "then no wrong is committed and no action will lie, although "damage to another ensues. The distinction between the "two classes of case is sometimes expressed by saying that in "cases of the former class there is not, while in cases of the "latter class there is, just cause or excuse for the action "taken."

This statement of principle is, I think, apt to be used as if it resolved the many difficulties in a difficult department of the law. Too often it is forgotten that the Lord Chancellor himself introduced it by saying that he deduces as material *for the decision of the present case* two propositions of law—the italics are mine. In that case the combination was not to injure but to forward or defend the trade of those who had entered into the combination, as in this it was to increase the membership of the trade union and protect the wages of its members, and Lord Cave's statement does not seek to comprehend all circumstances.

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(1) [1921] 3 K. B. 40, 71.

(2) [1898] A. C. 1.

(3) [1895] A. C. 587.

(4) [1925] A. C. 700, 712.

Cases in which the action of the confederates is to compel the plaintiff to pay a debt as in *Giblan* v. *National Amalgamated Labourers' Union* (1) have been held not to be within the principles, perhaps on the grounds stated by Romer L.J. (2), that the intent was to prevent the plaintiff from obtaining or retaining employment in order to compel him to pay a debt due from him " and from this the intent to injure the plaintiff "appears to follow." But what of the case where the defendants desire neither their own business advantage nor the injury of the plaintiff, e.g., where they combine to compel him to subscribe to an extraneous charitable fund? No answer to this question has yet been given, and perhaps it is enough for the purposes of the present case to say that the benefit is sufficiently direct if it be to increase the effective strength of a trade union, and to quote *Hodges* v. *Webb* (3) and *White* v. *Riley* (4) as illustrating this conclusion. The broad proposition was put by Lord Phillimore, then Phillimore J., in his dissenting judgment in *Boots* v. *Grundy* (5) in a way which will comprehend most cases. " If," he says, " a number "of persons, because of political or religious hatred, or from a "spirit of revenge for previous real or fancied injury, combine "to oppress a man and deprive him of his means of livelihood "for the mere purpose of so-called punishment, I think the "sufferer has his remedy. If the combination be to further "their own prosperity, if it be constructive, or destructive "only as a means to being constructive, the case is otherwise."

It was argued, however, that where you get a combination of persons such as masters and workers who are apt to be opposed in trade disputes, and when you find them joined in an endeavour on the one hand to eliminate competition and on the other to gain 100 per cent. trade union membership, the only common object must be to injure, since the masters could only rid themselves of competitors by injuring their opponents, and the workmen could only obtain a 100 per cent. trade union membership from masters with whom they were agreed and therefore could not attain their object until all others were driven out of the trade. The only common object therefore was to injure, though each party to the combination might have a separate ultimate aim of his own which would promote his own interests.

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(1) [1903] 2 K. B. 600.
(2) Ibid. 619.
(3) [1920] 2 Ch. 70, 89.
(4) [1921] 1 Ch. 1.
(5) (1900) 82 L. T. 769, 773.

An argument against the right of a combination of employers acting in conjunction with a trade union to refuse to employ anyone not possessed of that trade union's ticket was urged before Sargant J., as he then was, in *Reynolds* v. *Shipping Federation, Ld.* (1), a case in which a combination of masters and trade union officials agreed that only members of a particular trade union should be employed on the ships of the Federation. The learned judge rejected the argument. "Indeed," he said (2), "a decision in favour of the plaintiff "would lead to a strange anomaly. For many years past "no one has questioned the right of a trade union to insist, if "they are strong enough to do so, under penalty of a strike, "that an employer or a group of employers shall employ none but "members of the trade union. And the result of any such effective "combination of workmen has, of course, been to impose on "the other workmen in the trade the necessity of joining the "union as a condition of obtaining employment. Here, the "employers, instead of being forced against their wills into "employing union men only, have recognized that advantages "may arise from adopting such a course voluntarily, and have "accordingly made an agreement with the trade union to that "effect. The incidental result to the other workmen in the "trade is the same as if the employers had yielded against their "wills instead of agreeing voluntarily. But I fail to see that "workmen who are unwilling to join the union have any "greater reason to complain of a violation of their legal rights "in the second case than in the first." In that case the action was against the masters' federation, the trade union, its president and one of its representatives. It is true that the complaint came from the members of another trade union and not from another set of employers, but if the argument is sound, as I think it is, it cannot be confined to one class of confederates and be held inapplicable to another.

In the present case also masters and workmen combined. The common object was not to injure but to promote agreement between the two sets of employers, even though incidentally the immediate effect of the common purpose might be to bring a measure of injury upon the masters who were not millowners, but the ultimate aim was to protect and improve the interests of those who combined. The injury was but a step to an end.

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(1) [1924] 1 Ch. 28.

(2) Ibid. 39.

The combination was therefore not to injure but was to defend the interests of the parties to it and it becomes unnecessary to consider a case of mixed motive where the object was in part to injure and in part to benefit those who have combined, and equally unnecessary to lay down the principles applicable to a case where the object is neither to injure nor to promote the interests of the parties but some extraneous good or evil object with which they are not directly concerned. But apart from these considerations I am not myself prepared to accept the view that the joint object of the parties combining is necessarily alone to be looked at. Each party may well have its own private end to gain. The joint aim may at any rate be no more than a desire for prosperity or peace in the industry, and yet the combination may be justified. If, however, one of the parties had no purpose but to vent his own vindictive spite and if the other knew of and countenanced that purpose by giving his assistance to the malicious acts of the first, it may be that the other would then be a participant in the wrong planned by the first to which he gave his assistance.

I have so far dealt with Lord Cave's proposition as first stated, but he put it in an alternative form, namely, was there just cause or excuse for the action taken? So framed it furnished, as he intended it to furnish, a test for the solution of the case which he was considering, but it did not provide, nor did it purport to provide, a general formula for universal use. As Lord Dunedin pointed out in the same case, there is an earlier question: "Is there any wrong to be justified?" If the defendants have done no injury they do not require justification. The alternative proposition suggests that action which is necessarily injurious to the interests of others is in itself actionable unless it is defensible on some ground. It is true that the alternative method of approach is sometimes helpful in ascertaining whether the purpose of the combination is to injure others or to promote the interests of those in combination, but I should not myself regard it as the same question or decisive of the rights of the parties.

The true position is, I think, that some proceedings are not actionable because neither the end nor the means are wrongful but there are others in which either the end or the means are wrongful and yet those acting in combination are excused because they have just cause for what they have done. To induce the breach of a contract which may lead to immorality (see *Brimelow* v. *Casson* (1)), or of a contract which is an infringement of the right of the breaker (see *Smithies* v. *National Association of Operative Plasterers* (2), has been held to be justified. These however are only examples, and afford little assistance in determining the circumstances which will constitute sufficient justification. I doubt whether it is possible to define what those circumstances are. Perhaps one cannot safely go further than the statement to be found in *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (3), *Smithies* v. *National Amalgamation of Operative Plasterers* (2), and *Conway* v. *Wade* (4), per Lord Loreburn, that they are not matters for definition but for a consideration of the individual circumstances of each case. Whatever the limits within which just cause or excuse are confined, this class of case is, I think, an exception to the general rule that a combination to do what is unlawful or to do what is lawful by unlawful means is actionable, and is not an alternative expression of the principle itself. It may indeed be more meritorious to induce the breach of a contract contra bonos mores than merely to pursue one's own selfish ends, but the one requires justification in law and the other does not.

I have ventured to add these observations not because the questions raised in them demand solution in the present case, but in order to show the limits of the present decision, and lest it should be thought that the decision is authority for wider and more comprehensive principles than the actual circumstances require. For my own part I am content, following the opinions of the Lord Ordinary and the Inner House, to say that whatever the effect of their action might be the confederates, millowners and defenders, had a common object of benefiting themselves and not of injuring the plaintiffs and so must succeed in their defence.

Solicitors for appellants: *Ince, Roscoe, Wilson & Glover, for Dove, Lockhart & Smart, S.S.C., Edinburgh, and Newlands & Warner, W.S., Glasgow.*

Solicitors for respondents: *Pattinson & Brewer, for Allan M'Dougall & Co., S.S.C., Edinburgh.*

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(1) [1924] 1 Ch. 302.
(2) [1909] 1 K. B. 310.
(3) [1903] 2 K. B. 545.
(4) [1909] A. C. 506, 511.

F. H. C.

[HOUSE OF LORDS.]

STEELE . . . . APPELLANT;		H. L. (N. I.)*
AND		1942
ROBERT GEORGE AND COMPANY (1937), LIMITED	RESPONDENTS.	*Jan.* 14, 15; *Mar.* 4.

Workmen's compensation—Incapacity resulting from injury—Workman's refusal to undergo operation—Reasonableness—Question of fact—Burden of proof—Workman's doctor against operation—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 1.

The question whether a workman is unreasonable in refusing to undergo a surgical operation with the object of diminishing an incapacity resulting from an accident is a question of fact to be decided by the judge of fact on the evidence. The onus of proving that the workman's refusal to undergo the operation is unreasonable is on the employer. Where the workman has been advised against the operation by a skilled medical man in whom he has confidence the employer can only discharge that onus by bringing home to the workman an extremely strong body of expert advice in favour of the operation.

Decision of the Court of Appeal in Northern Ireland [1941] N. I. 133, reversed.

APPEAL from the Court of Appeal in Northern Ireland.

The facts were stated by Viscount Simon L.C. as follows: The appellant was a joiner and on February 4, 1938, while working for the respondents, he fell from a height, landing on his feet on a tiled floor, and as a result his left ankle joint sustained a comminuted fracture which completely incapacitated him. He received weekly payments on this basis until September 3, 1940, when the respondents terminated the payments, alleging that his condition thenceforward was due to his unreasonable refusal to undergo a surgical operation. The appellant requested an arbitration. The case was heard by the recorder of Belfast and the evidence disclosed a conflict in the medical opinions tendered to the disabled appellant. Mr. Irwin, the surgeon who attended him in hospital after the accident and saw him on many occasions during the next two years, advised an operation, which, by making the injured joint stiff, would relieve the pain suffered from standing and would, as Mr. Irwin confidently expected, give him a "strong "stable limb." Mr. Irwin described the operation as a reasonable one, without extra risk beyond that attending any operation, and one which in his own practice had produced excellent results. Another surgeon, Major Fraser, who had also examined the appellant's injury, confirmed Mr. Irwin's view. The appellant, however, consulted a third surgeon to whom he was sent by his trade union, and this gentleman advised against the operation. The findings of the recorder, who ordered the respondents to pay the appellant a weekly sum of compensation, were as follows: "On this evidence I "find that the applicant suffered a very severe and intractable "injury as a result of which in his present condition he cannot "bear weight on his foot without pain, and, therefore, cannot "do joinery work, and no other work was suggested which he "could do. I summarized the evidence on both sides and "said one might consider the applicant in two capacities: "(1.) as a patient when the question would be 'On balance of "'evidence, is operation a reasonable one?'; and (2.) as a "claimant under the Workmen's Compensation Acts, when "the question would be: 'Has the employer proved that his "'incapacity is due to unreasonable refusal to undergo "'operation?' Sometimes these points of view clash, as here, "where the man seemed more anxious to establish his right "under workmen's compensation than to get well. On balance "of evidence I would hold operation one which a man might "reasonably undergo. It affords a reasonable chance of "relief from pain and ability to do some work, and the alternative is a lifetime of pain and idleness. There is no other "remedy. But the real question for me is No. 2 and on this "I find that: (*a*) a competent surgeon advises against the "operation; (*b*) there is evidence that, even if the operation "were successful, the man could not work or earn wages. As "to (*b*), I do not accept the contention that a joiner with a "stiff ankle can earn no money; but I cannot hold the "claimant unreasonable in following the advice of a competent "surgeon in the present case." The respondents having appealed, the Court of Appeal in Northern Ireland (Andrews C.J., Babington and Murphy L.JJ.) allowed the appeal, holding that the appellant was unreasonable in refusing to undergo the operation and that he was not entitled to an award of compensation. The appellant appealed to the House of Lords.

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* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

Thomas Campbell K.C. (of the English Bar, K.C. of the Irish Bar) and *John Agnew* (of the Irish Bar) for the appellant.

Paull K.C. and *Goldie* (of the Irish Bar) for the respondents.

The arguments appear sufficiently from the opinions delivered.

The House took time for consideration.

VISCOUNT SIMON L.C. My Lords, the Workmen's Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end or be reduced if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that, if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity "results from "the injury" within the meaning of s. 9 of the Act of 1925, after the time when the rejected remedy might be confidently expected to bring about a cure. As Fletcher Moulton L.J. put it in *Warncken* v. *R. Moreland & Son, Ld.* (1), "a workman "must behave reasonably, and if the incapacity, or the "continuance of the incapacity after a certain time, is due "to the fact that he has not behaved reasonably, then the "continuing incapacity is not a consequence of the accident, "but a consequence of his own unreasonableness." This view of the matter has been recognized by this House in *Fife Coal Co., Ld.* v. *Cant* (2), and in *Fyfe* v. *Fife Coal Co., Ld.* (3), as well as in many cases in the Court of Appeal in England and in the Court of Session in Scotland. Andrews C.J., in dealing with the present case in the Court of Appeal in Northern Ireland, admirably stated some of the considerations involved as follows (4): "If he [the workman] refuses to submit to "an operation from defect of moral courage or because he is "content to put up with the disablement and is willing to live "on a pittance under the Workmen's Compensation Act he "is not entitled to compensation. To borrow the language "of the Lord Justice Clerk" [Lord Macdonald in *Donnelly* v. *Baird & Co., Ld.* (5)], "the workman should do what a man "of ordinary manly character would undergo for his own good,

(1) [1909] 1 K. B. 184, 189.
(2) 1921 S. C. (H. L.) 15.
(3) 1927 S. C. (H. L.) 103.
(4) [1941] N. I. 133, 136.
(5) 1908 S. C. 536, 540.

"in a case when no question of compensation being due by "another existed."

The principle is, therefore, established, though I may observe that cases might arise in which there would be some difficulty in working out the quantitative result of applying it. For example, if the proposed operation can at best only work a partial cure, it does not appear to be an easy matter to fix what the reduced figure of compensation should be. And a converse case may be imagined. Supposing that a workman who is partially incapacitated undergoes an operation which is recommended as likely to cure him, but the operation fails and reduces him to total incapacity—is the compensation due from the employer thereby increased ?

In the present appeal, however, we are not troubled with these conundrums. Mr. Paull, in his candid and ingenious argument for the respondents, examined the grounds advanced for the opinion of the appellant's surgeon with a view to showing that the reasoning of the two experts who advised an operation should be preferred. This, however, is not the immediately relevant issue. The relevant question is whether the appellant was unreasonable in refusing to submit himself to the operation. It may in some cases be quite reasonable for a man to decide not to undergo an operation if his own doctor advises against it, for it is the conclusion reached by his doctor which governs his decision much more than the logic by which his doctor has reached the conclusion. In 1915, Lord Strathclyde, then Lord President of the Court of Session, went so far as to say in *Gracie* v. *Clyde Spinning Co., Ld.* (1), that he was prepared to hold " that, save in very "special circumstances, the proximate cause of incapacity "never can be the unreasonable refusal of a workman to "undergo an operation if his own medical adviser advises him "against undergoing that operation." The Lord President regarded this as the result of the decision of the Court of Session in *Sweeney* v. *Pumpherston Oil Co., Ld.* (2). It is not necessary to adopt a proposition which goes so far as this, and, indeed, Lord Birkenhead L.C., in *Fife Coal Co., Ld.* v. *Cant* (3), insisted that in each case the circumstances must be considered and that there was no general rule excusing the workman from undergoing a reasonable operation because his medical adviser advised against it. It is enough to say that

(1) 1915 S. C. 906, 910.

(2) (1903) 5 F. 972.

(3) 1921 S. C. (H. L.) 15, 22.

the question whether the workman is unreasonable in refusing to undergo an operation is a question of fact to be decided by the judge of fact on the evidence, and that where the workman has been advised against the operation by a skilled medical man in whom he has confidence, it would be necessary to bring home to the workman an extremely strong body of expert advice to the contrary before the onus which rests on the employer of proving that the refusal was unreasonable should be regarded as discharged.

The recorder considered it to be proved that the operation was one which a man in the appellant's condition might reasonably undergo, and that it afforded a reasonable chance of relief from pain and of ability to do some work, while the alternative was a lifetime of pain and idleness. But he went on to say: " But I cannot hold the claimant unreasonable "in following the advice of a competent surgeon in the present "case." The Court of Appeal has interpreted this last sentence as a ruling in point of law. If the recorder should be understood as having asserted as matter of law that as long as an injured workman follows the advice of his own doctor in refusing to undergo the operation, the employer's case must fail, whatever the other circumstances are, he would have misdirected himself. But I do not so understand the sentence. The last four words of it show that no abstract doctrine was being enunciated, and when the recorder said: "I cannot hold," he did not, in my opinion, mean that the law constrained him to decide as he did, but that on a review of all the circumstances of the particular case, he felt unable to decide as a matter of fact that the appellant had acted unreasonably. There was evidence to support this conclusion of fact, and it cannot be upset on appeal. If the recorder, as the final judge of fact, had decided otherwise, his decision would have been equally unassailable. The appeal must, therefore, be allowed. I must add that, even if the recorder had been open to correction in point of law, I do not see how the Court of Appeal could itself properly undertake to determine the question of fact which would then arise. It would still be for the recorder to decide on the evidence to what conclusion of fact he himself would arrive. I move that the appeal be allowed with costs here and in the Court of Appeal.

Lord Atkin. My Lords, I agree with the opinion which has just been given by the Lord Chancellor and only add a few words as we are differing from the decision of the Court of Appeal. The appeal turns on the true view to be taken of the judgment of the learned recorder on a pure question of fact. The Court of Appeal appear to have considered that the recorder had found as a fact that the employers had proved that the workman was unreasonable in not submitting to the operation, but had held as a matter of law that the advice of the workman's doctor compelled a decision in his favour. I do not think that such a view does justice to the learned recorder. It appears to me that he rightly considered all the facts, including the important fact of the advice of the workman's doctor, and came to the conclusion in fact that the employers had not discharged the onus which lay on them to prove that the refusal of the workman to undergo the operation in the circumstances was unreasonable. As that decision was one of fact to support which there was ample evidence it is unassailable. I agree with the proposed motion.

LORD WRIGHT. My Lords, the appellant is appealing against an order of the Court of Appeal, discharging an award made by the recorder of Belfast in favour of the appellant for compensation under the Workmen's Compensation Act. The Court of Appeal held that, though the appellant had received an injury by accident arising out of and in the course of his employment, it had been established to the satisfaction of the court that he had been unreasonable in refusing to undergo an operation by which the incapacity resulting from the accident might be removed or reduced. The court ordered that the arbitration should stand adjourned with liberty to either party to apply.

The decision of the Court of Appeal presupposes, as I understand it, either that the recorder has made no finding of fact on the relevant issue, which is whether there has been an unreasonable refusal on the part of the man, or that his finding of fact is unsupported by evidence or involves a misdirection in law and, therefore, cannot stand. It is clear that the question whether a refusal to undergo an operation in cases of this character is reasonable or unreasonable "is an "absolute matter of fact" as Lord Dunedin said in this House in *Fyfe* v. *Fife Coal Co., Ld.* (1). If the arbitrator decided that the refusal was not unreasonable there is an end of the matter unless there was no evidence to support his finding or he misdirected himself. In the present case, the recorder's words were: "I cannot hold the claimant unreasonable in "following the advice of a competent surgeon in the present "case." The words which precede or follow in the award are merely argumentative. The precise words of decision which I have quoted correctly approach the problem as being one the solution of which depends on the facts of the case. The recorder expressly limits his decision to the present case. The recorder also treats the problem as being one in which the precise issue is whether the employers have discharged the burden of proof which rests on them of showing that the man was unreasonable in his refusal to undergo the operation, and refuses to hold that they have. That is how I construe the award, and, in my opinion, the result is that the decision is final. It is not based on any principle as to what does or does not in law constitute unreasonableness in these matters. Indeed, I do not see that any legal rule can be stated to determine the decision of the arbitrator. As Lord Birkenhead explained in *Fife Coal Co.* v. *Cant* (1), the circumstances must be considered in each case. A good many decisions have been reported on this question, but once it is appreciated that the question is one of fact, decisions in other cases are more likely to mislead than to guide, though perhaps sometimes it may help to know what was decided on more or less similar facts.

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(1) 1927 S. C. (H. L.) 103, 106.

The rule as to the effect of an unreasonable refusal by a workman to undergo an operation, which has been approved by the two decisions of this House which I have quoted, was a piece of judicial legislation adopted by the Court of Appeal as long ago as 1903, but it has not been disavowed or qualified by the legislature in the subsequent revisions or re-enactments of the Act. It must be taken to have commended itself to the general sense of the community, but it is not easy to understand or apply. It is rather a penalty provision than anything else. I find it not very logical to say that the workman's refusal breaks the chain of causality between the accident and the incapacity. On the contrary, effects of the accident still remain. The operation, furthermore, may not be successful, even if it is not refused. Quite apart from the surgical evidence in the particular case, which may be conflicting, the workman's own physical or mental idiosyncracy cannot in general be excluded. I believe that arbitrators have approached these questions in a humane and liberal spirit, realizing that the question cannot be decided save on a sympathetic estimate of the workman's personality and the special circumstances of the particular case.

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(1) 1921 S. C. (H. L.) 15.

With the greatest respect to the Court of Appeal, I cannot agree with their conclusion. In any event they were not entitled to usurp the function of the recorder as the judge of fact. For the reasons stated by my noble and learned friend the Lord Chancellor I concur in the motion proposed.

LORD ROMER (read by LORD PORTER). My Lords, it appears to have been decided by authorities that are binding on this House that where an incapacitated workman unreasonably refuses to submit himself to an operation which, if successful, would restore his capacity in whole or in part, his right to compensation on the footing of his existing incapacity ceases as from the date on which the capacity might reasonably be expected to have been so restored had the operation been successfully performed. The question whether in any particular case the workman has unreasonably refused to undergo an operation is purely a question of fact, and is, therefore, one on which the finding of the arbitrator is conclusive unless there is no evidence on which his finding can properly be based or unless he has misdirected himself in law. In the present case the arbitrator was the learned recorder of Belfast, and he plainly decided the question of fact in favour of the appellant, for he said: "I cannot hold the claimant un"reasonable in following the advice of a competent surgeon "in the present case," and he made an award in the appellant's favour. It cannot be denied that there was ample evidence on which this finding of fact could be based. The Court of Appeal, however, set aside the award of the arbitrator on the ground that he had misdirected himself in law. Looking at the award as a whole, they came to the conclusion that the arbitrator himself was of opinion on the evidence that the appellant was unreasonable in refusing to undergo the operation, but that he, the arbitrator, considered himself bound as a matter of law to decide in the appellant's favour merely by reason of the fact that the appellant's own surgeon had advised against it, and without the arbitrator forming any conclusion as to the weight that ought to be attached to the surgeon's opinion or as to the grounds on which that opinion was based. The Lord Chief Justice, after referring to the finding which I cited a few moments ago, said this (1): "In this finding, at "which he appears to have arrived without considering the "grounds or the sufficiency of the reasons advanced by the "surgeon in support of his opinion, the learned recorder was, "in my opinion, in error on the authorities to which I have "referred, and on this vital issue he accordingly misdirected "himself." Babington L.J. said (2): "The recorder's award "as I read it finds that the applicant was unreasonable in "not submitting to the operation in fact, but that he was not "unreasonable in law because his refusal was based on the "advice of his own doctor." Murphy L.J., after referring to the opinion of the surgeon in question, said (3) that the recorder did not appear to have agreed with it, and that in treating that opinion as conclusive on the question of the reasonableness of the appellant the recorder had misdirected himself.

My Lords, if the Court of Appeal were right in the construction which they put on the award, they were unquestionably right in allowing the appeal. With all respect to the learned recorder, it must be confessed that his award is not so clear as could have been wished. I have, nevertheless, come to the conclusion, after giving it my careful consideration, that it does not bear the meaning attributed to it by the Court of Appeal. A perusal of the judgments of that court makes it clear that the conclusion to which they came was largely if not wholly based on a finding in the award that comes a little earlier than the one which I have already cited. It is in these words: "On balance of evidence I would hold "operation one which a man might reasonably undergo. It "affords a reasonable chance of relief from pain and ability "to do some work, and the alternative is a lifetime of pain "and idleness. There is no other remedy." This was understood by the Court of Appeal to be a finding by the learned recorder that in his opinion the refusal of the appellant to undergo the operation was unreasonable. I do not so read it. It is no more than a finding that there was nothing unreasonable in asking a man—i.e., any man suffering from the same physical disabilities as the appellant's—to undergo the operation, Had the finding been the other way, there would have been no more to be said. The award would necessarily have been in the appellant's favour. As it was, it was necessary for the

(1) [1941] N. I. 133, 142.
(2) Ibid. 143.
(3) Ibid. 146.

arbitrator to go on to consider whether in the particular case before him the appellant's refusal was unreasonable. He held that it was not, and I can find nothing inconsistent in the two findings. Nor can I find in the later of the two findings any indication that the recorder regarded himself as bound by law to hold that a workman necessarily acted reasonably in refusing an operation merely because his own surgeon advised him to do so. The recorder was careful to confine his finding to the advice of the "competent surgeon "in the present case." I cannot think that he would have described the surgeon as competent if he had considered neither the grounds nor the sufficiency of his opinion, nor would he have added the words "in the present case" if he had been merely intending to state a proposition of law. The surgeon had stated in his evidence that, although the operation, if successful, would prevent lateral movement of the joint, it would, if unsuccessful, result in there being no movement in the joint at all. I can find no indication in the award that this evidence was not accepted by the recorder, and, if he did accept it, it is only reasonable to suppose that he took it into consideration in forming an opinion as to the reasonableness or otherwise of the appellant's refusal. With all deference to the Court of Appeal I am unable to agree with them that the recorder misdirected himself in any way. If he did not, his finding that the appellant was not unreasonable in his refusal must be taken to be conclusive. For these reasons I would allow the appeal, and I concur in the motion now before the House.

Lord Porter. My Lords, I agree and have little to add. The only question in the present case, as I understand the matter, is to determine whether the learned arbitrator was justified in law on the facts found or admitted in holding that the respondents had not proved the appellant to have acted unreasonably in refusing to undergo the operation which was suggested. His main findings were (1.) that on a balance of evidence the operation is one which a man might reasonably undergo, but (2.) "I cannot hold the claimant unreasonable "in following the advice of a competent surgeon *in the present* "*case*." The italics are mine. If this were all, the respondents' case would be unarguable, but it is said that the second finding, when read in the light of his other conclusions, means : "I cannot hold any claimant including this one unreasonable "in any case where he follows the advice of a competent "surgeon. If it were not that I take this view, I should "hold him unreasonable." The other findings which are relied on to support this contention are : (i.) "The man seemed "more anxious to establish his right under workmen's com-"pensation than to get well" ; (ii.) The operation "affords a "reasonable chance of relief from pain and ability to do some "work, and the alternative is a lifetime of pain and idleness. "There is no other remedy."

As to the first of these additional findings, it is said that the true test is laid down in the Court of Session in the judgment of Lord Macdonald in *Donnelly* v. *Baird & Co., Ld.* (1), and that where a tribunal has to decide as to the reasonableness or unreasonableness of a workman's attitude in refusing to undergo an operation, the questions to be determined are: Was there any serious risk ? and, Would a workman of manly character undergo the operation ? In making up his mind, it was said, the workman was not entitled to consider that, by refusing, he would retain his compensation when, by consenting, he might lose the whole or part of it. This statement of the law does not, to my mind, mean that wherever a workman is influenced by the fact that he is receiving compensation he is acting unreasonably in refusing to undergo an operation. Probably, no workman can fail to be moved to some extent by such a consideration. Between starvation and an operation involving a serious risk he might well choose the latter, but yet refuse to undergo it where he was in receipt of compensation, and yet not be held unreasonable in doing so. But the overriding consideration must not be the retention of compensation where other circumstances make the refusal to undergo the operation unreasonable. It is true that in the present case the operation is not a serious one, but, nevertheless, it seems to me impossible to overrule the finding of an arbitrator who comes to the conclusion that the workman has not been unreasonable in the circumstances in following the advice of a competent surgeon—the circumstances, apparently, being that the surgeon took the view that, if the operation were unsuccessful, the workman would be worse than before, and that both the man himself and his trade union representative thought that, even if it were successful, he would be unable to follow his former employment. The witnesses might be wrong in their beliefs yet not unreasonable in holding them and the appellant not unreasonable in acting on them. It is admitted that the onus of proving that the workman has been unreasonable is on the employer, and to succeed he must, I think, procure a finding of the arbitrator to that effect. It is not enough that there was evidence both ways or even that there was evidence from which a finding might be drawn that the man was unreasonable. In default of such a finding the matter should be referred back to the arbitrator. It could only be decided by a Court of Appeal in favour of the employer if it inevitably followed from the facts found that the workman must in law have been held to be unreasonable. So far from this being the case in the present instance, there is a finding of fact in favour of the appellant, and, in my view, no lack of evidence to support it. There are no findings or admitted facts from which it was incumbent on the arbitrator to find the appellant unreasonable.

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(1) 1908 S. C. 536.

In the course of the argument we have been referred to a number of cases where the workman has or has not been held to be unreasonable as the case might be. I do not find myself much assisted by them. They seem to turn largely on the facts of the individual case and on the findings of the several arbitrators.

My Lords, in arriving at this conclusion, I am not conscious of differing from the views of the members of the Court of Appeal in Northern Ireland in any general matter of the law applicable to workmen's compensation. I differ only on their construction of the finding of the learned arbitrator. They took him to mean that where the workman followed the advice of his doctor he could never be held to be unreasonable and that in this particular case he would have found the appellant unreasonable had it not been for this view. As I have pointed out, I do not so understand him. I think he took into consideration, as indeed he states, all the circumstances of the case, and having regard to those circumstances I think he had legal grounds for his conclusion. I would allow the appeal.

Solicitors for appellant: *L. Bingham & Co., for H. J. Catchpole, Belfast.*

Solicitors for respondents: *C. Grobel, Son & Co., for J. Donnelly & Co., Belfast.*

[HOUSE OF LORDS.]

CENTURY INSURANCE COMPANY, LIMITED . . . . } APPELLANTS; H. L. (N. I.)*

1942

AND

Jan. 19, 22, 23; Mar. 4.

NORTHERN IRELAND ROAD TRANSPORT BOARD . . . . } RESPONDENTS.

Master and servant—Transference of employment—Agreement by transport undertaking with petroleum company—Delivery of petrol in vehicles of undertaking—Obligation of employees of undertaking to obey orders of company.

Negligence—Scope of employment—Employee delivering petrol from tanker to storage tank—Smoking—Lighted match thrown on floor.

Under a contract with a petroleum company for the carriage and delivery of their petrol in its lorries, a transport undertaking agreed (*a*) to keep the petrol while in transit insured against fire and spillage; (*b*) to dress its employees engaged in the delivery in such uniforms as the company might direct; and (*c*) that its employees engaged in the delivery were to accept the orders of the company "regarding such delivery, the payment of accounts "and all matters incidental thereto," provided that this should not be taken as implying that its employees were the employees of the company. While one of the lorries belonging to the undertaking, in respect of which a policy had been issued by an insurance company against liability to third parties arising from damage to property caused by its use by the undertaking, was being used to deliver petrol at a garage in accordance with the agreement, the driver, while transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and threw it on the floor, causing a conflagration and an explosion. Claims in respect of consequent damage having been made against the undertaking, the insurance company contended that they did not fall within the scope of the policy:—

Held, that (1.) the contract did not contemplate any transference of servants as contrasted with transference of service, and the driver at the time of the accident was acting as the servant of the undertaking; (2.) the careless act of the driver was done in the course of his employment so that the undertaking was responsible for the consequences, and, accordingly, entitled to be indemnified under the policy.

Jefferson v. *Derbyshire Farmers, Ld.* [1921] 2 K. B. 281 followed.

Williams v. *Jones* (1865) 3 H. & C. 602 considered. Judgments of dissenting minority (Blackburn and Mellor JJ.) preferred.

Decision of the Court of Appeal in Northern Ireland [1941] N. I. 77 affirmed.

**Present:* VISCOUNT SIMON L.C., LORD WRIGHT, LORD ROMER and LORD PORTER.

H. L. (N. I.)
1942
CENTURY INSURANCE Co. *v.* NORTHERN IRELAND ROAD TRANSPORT BOARD.

APPEAL from the Court of Appeal in Northern Ireland.

The facts were stated by VISCOUNT SIMON L.C. as follows. The respondents were insured by the appellant company under s. II. of a policy of insurance against liability to third parties arising from damage to property caused by the use by them of a petrol tanker belonging to the respondents. On August 2, 1937, this tanker, which was being driven by their employee, one Davison, had taken on board a consignment of three hundred gallons of petrol at the Larne depot of Holmes, Mullin & Dunn, Ld., for delivery into the storage tank of one Catherwood, a garage proprietor, of Belfast. Davison drove the tanker to Belfast, backed it into Catherwood's garage, inserted the nozzle of the delivery hosepipe into the manhole of Catherwood's tank and turned on the stopcock at the side of the tanker. While the petrol was flowing from the tanker into the tank, Davison lighted a cigarette and threw away the lighted match. The match ignited some material on the floor of the garage and a fire was caused forthwith where the nozzle of the delivery hose was discharging into the tank. Catherwood seized a fire extinguisher and started to play it on the fire which appeared at the manhole, at the same time shouting to Davison to turn off the stopcock. Davison did not do so, or attempt to do so, but started up the tanker and drove it out of the garage until the fore wheels had about reached the water channel in the street. Davison then stopped the tanker and jumped to the ground. The fire, although extinguished at the manhole by Catherwood, pursued the trailing hose and the escaping petrol, and Davison had barely reached the ground when a very violent explosion occurred. The explosion destroyed the tanker, the motor car of Catherwood which was parked in the street, and also damaged several houses which were the property of other parties. The claims in respect of the motor and houses were settled for 1001*l.* 16*s.* 7*d.*, which was paid by the appellants without prejudice to their ultimate rights, but they contended that they were not liable. One of the grounds on which the appellants resisted the claim of the respondents under the policy was that, in view of the terms of an agreement of October 11, 1934, between the respondents' predecessors, the Irish Road Transport Co., Ld., whose undertaking they acquired on April 30, 1937, and Messrs. Holmes, Mullin & Dunn, Ld., the liability for the damage did not rest on the respondents. By cl. 1 of this agreement the respondents, when requested to do so by Holmes, Mullin & Dunn, Ld., were bound to deliver petroleum spirit which Holmes, Mullin & Dunn, Ld., had for disposal to any destination within Northern Ireland. The delivery was to be by tank lorries at an agreed scale of freights. The lorries were to be loaded at the installation of Holmes, Mullin & Dunn, Ld., at Larne, and the respondents were to keep sufficient tank lorries at Larne to transport all the spirit which might be given to them for delivery. The respondents were to keep the spirit, while in transit, insured against fire and spillage (cl. 5) and were to dress all their employees engaged in such delivery in such uniforms as Holmes, Mullin & Dunn, Ld., might direct (cl. 6). The respondents undertook to effect all necessary insurances under the Workmen's Compensation Acts (cl. 11) and to be accountable to Holmes, Mullin & Dunn, Ld. for the product entrusted to them for delivery (cl. 12). The clause of the agreement mainly relied on by the appellants as establishing that, at the time of the accident, Davison was the servant, not of the respondents, but of Holmes, Mullin & Dunn, Ld., was cl. 9, which provided that all the employees of the respondents engaged in or about such delivery should accept and obey the orders of Holmes, Mullin & Dunn, Ld., "regarding such "delivery, the payments of accounts and all matters incidental "thereto," and that the respondents should dismiss any employee "disregarding or failing to obey such orders." There followed the proviso that nothing contained in the clause should be taken as implying that such employees were in any way the employees of Holmes, Mullin & Dunn, Ld. The dispute whether the appellants were liable under the policy was referred to the arbitration of Mr. Lowry K.C., who stated his award in the form of a special case. The relevant questions formulated in the special case were: (1.) Was Davison at the time of the accident acting as the servant of the respondents or of Holmes, Mullin & Dunn, Ld.? (2.) Was the admittedly careless act of Davison in lighting a cigarette and throwing the match on the floor of the garage an act done in the course of his employment as such servant, for the consequences of which his master was responsible? The arbitrator, subject to the special case, answered the first question by saying that at the time of the accident Davison was acting as the servant of the respondents and the second question in the affirmative. Brown J., before whom the special case came, was of a different opinion as regards the first question, and held that Davison was at the relevant moment the servant of Holmes, Mullin & Dunn, Ld. He agreed with the arbitrator as to the answer to the second question. The Court of Appeal in Northern Ireland (Andrews L.C.J., Babington and Murphy L.JJ.) unanimously reversed Brown J. on the first question and affirmed the answers arrived at by the arbitrator (1). The appellants appealed to the House of Lords.

Macaskie K.C. and *Patton* for the appellants. The respondents, and, consequently, the appellants, were not liable to meet the claims for the damage caused by the fire and explosion since, on the true construction of the contract, and in particular giving effect to cl. 9, Davison was the servant of Holmes, Mullin & Dunn, Ld., in respect of the operation then being performed. Effect must be given to every part of the contract and it is not permissible to strike out or nullify any clause: *In re Strand Music Hall Co., Ld.* (2). Under the contract the tanker and driver were lent to the company by the respondents for a consideration. The right to control them in respect of the relevant operation was vested in the company. Such control may exist side by side with the general control exercised in other respects by the general master over his servant, and in this way there may be a dual control. [They referred to *Quarman* v. *Burnett* (3); *Sadler* v. *Henlock* (4); *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Ld.* (5); *Waldock* v. *Winfield* (6); *M'Cartan* v. *Belfast Harbour Commissioners* (7); *Bain* v. *Central Vermont Ry. Co.* (8); *G. W. Leggott & Son* v. *C. H. Normanton & Son* (9).] The appellants rely in particular on cls. 6, 9 and 11 of the contract. Further, the careless act of Davison was not an act done in the course of his employment so as to make his employers liable. He was negligent at the time of his employment but not in the course of it: see Salmon on Torts, 9th ed., p. 104. This was merely a case of smoking negligently; not one of working negligently. They relied on *Williams* v. *Jones* (10) and contended that *Jefferson* v. *Derbyshire Farmers, Ld.* (11), was distinguishable on the facts.

(1) [1941] N. I. 77.
(2) (1865) 35 Beav. 153.
(3) (1840) 6 M. & W. 499.
(4) (1855) 4 E. & B. 570.
(5) [1893] 1 Q. B. 629.
(6) [1901] 2 K. B. 596.
(7) [1911] 2 Ir. R. 143.
(8) [1921] 2 A. C. 412.
(9) (1928) 98 L. J. (K. B.) 145.
(10) (1865) 3 H. & C. 602.
(11) [1921] 2 K. B. 281.

Whitaker K.C. (of the English Bar and K.C. of the Irish Bar), *Fox K.C.* and *L. E. Curran* (both of the Irish Bar) for the respondents were not called on to argue.

The House took time for consideration.

1942. Mar. 4. VISCOUNT SIMON L.C. My Lords, in this appeal I should be well content to adopt the unanimous judgments delivered in the Court of Appeal in Northern Ireland, which appear to me to provide a conclusive answer to the argument for the appellants.

As to the first question formulated in the special case, no one disputes the proposition that a man may be in the general employment of X. and yet at the relevant moment, as the result of arrangements made between X. and a third party, may be the servant of the third party so as to make the third party and not X. responsible for his negligence, and I agree that the test to be applied is the test formulated by Bowen L.J. in *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Ld.* (1), namely, "in whose employment the man was at the "time when the acts complained of were done, in this sense, that "by the employer is meant the person who has a right at the "moment to control the doing of the act." If it were true that the effect of the written agreement under which the Board's petrol tanker was to carry and deliver Holmes, Mullin & Dunn, Ld.'s petroleum spirit to its destination was to lend the vehicle and its driver to Holmes, Mullin & Dunn, Ld., it might well be that while making delivery at the garage Davison was not acting as the servant of the respondents but as the servant of Holmes, Mullin & Dunn, Ld. Bowen L.J., in *Moore* v. *Palmer* (2), emphasized that "the great test was "this, whether the servant was transferred, or only the use and "benefit of his work," but, as Andrews C.J. observes (3): the provisions of the agreement point irresistibly to the conclusion that the agreement was one of carriage and delivery to be performed by the predecessors of the respondents with their own servants. It was not a contract for the hiring out of lorries and men, or of lending them to Holmes, Mullin & Dunn, Ld., to enable them to effect delivery. Clause 9 of the agreement does not, in my opinion, run counter to this view. The provision that the transport company's employees shall accept and obey the orders of Holmes, Mullin & Dunn, Ld. regarding delivery means that they shall carry out delivery orders, not that at some moment of the transit and delivery (Mr. Macaskie prefers to fix the moment no later than the time when they take on their load of spirit at Larne) they became servants of Holmes, Mullin & Dunn, Ld. In truth, the position of the respondents under the contract is not that of people who lend vehicles and drivers for the hirers to direct, but of independent contractors who undertake by the use of their own vehicles and by the activities of their own servants to produce the results, i.e., the deliveries, as ordered by Holmes, Mullin & Dunn, Ld. The decision of the Court of Appeal, overruling Brown J. on this matter, cannot be successfully impeached.

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(1) [1893] 1 Q. B. 629, 633, 634.

(2) (1886) 2 T. L. R. 781, 782.

(3) [1941] N. I. 77, 84.

On the second question, every judge who has had to consider the matter in Northern Ireland agrees with the learned arbitrator in holding that Davison's careless act which caused the conflagration and explosion was an act done in the course of his employment. Admittedly, he was serving his master when he put the nozzle into the tank and turned on the tap. Admittedly, he would be serving his master when he turned off the tap and withdrew the nozzle from the tank. In the interval, spirit was flowing from the tanker to the tank, and this was the very delivery which the respondents were required under their contract to effect. Davison's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow, and to turn off the tap when the proper quantity had passed from the tanker. In circumstances like these, "they "also serve who only stand and wait." He was presumably close to the apparatus, and his negligence in starting smoking and in throwing away a lighted match at that moment is plainly negligence in the discharge of the duties on which he was employed by the respondents. This conclusion is reached on principle and on the evidence, and does not depend on finding a decided case which closely resembles the present facts, but the decision of the English Court of Appeal twenty years ago in *Jefferson* v. *Derbyshire Farmers, Ld.* (1), provides a very close parallel. As for the majority decision, nearly sixty years before that, of the Exchequer Chamber in *Williams* v. *Jones* (2) it may be possible to draw distinctions, as the court in *Jefferson's* case (1) sought to do, but this House is free to review the earlier decision, and for my part I prefer the view expressed in that case by the minority, which consisted of Blackburn and Mellor JJ. The second question must also be answered adversely to the appellants. I move that the appeal be dismissed with costs.

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(1) [1921] 2 K. B. 281.

(2) 3 H. & C. 602.

I am authorized by my noble and learned friend Lord Romer, who is not able to be present, to say that he concurs in this opinion.

LORD WRIGHT. My Lords, my noble and learned friend the Lord Chancellor has fully stated the facts. I agree with his reasoning and conclusions, and I may add with the judgments of the Lord Chief Justice and the lords justices. I should be content simply to express my concurrence with the Lord Chief Justice's convincing judgment. I add a few words merely on the two questions of law.

First comes the question in whose employment Davison was. This problem and its decision have produced a good many reported cases in the books. In *M'Cartan* v. *Belfast Harbour Commissioners* (1), this House emphatically stated that it is a question of fact how the maxim respondeat superior is to be applied in any particular case of this character. The problem is to determine who is the " superior " in the particular instance. Lord Dunedin said categorically that the facts of one case can never rule another case and are only useful so far as similarity of facts (for identity, the word so often used, is really a convenient misnomer) are a help and guide to decision, but, all the same, it has been sought to find some general idea, or perhaps mere catchword, which may serve as a clue to solve the problem, and for this purpose the idea or the word " control " has been introduced. Thus Lord Dunedin in *Bain* v. *Central Vermont Ry. Co.* (2), quotes the following language of Bowen L.J. in *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Ld.* (3) : " We have "only to consider in whose employment the man was at the "time when the acts complained of were done, in this sense, "that by the employer is meant the person who has a right "at the moment to control the doing of the act." If that were a complete statement of what Bowen L.J. said, I should be driven to question whether it was not too vague and indeterminate to afford any useful guidance, but Bowen L.J. did not stop there. Indeed, Lord Dunedin merely gives the quotation as the first sentence of what Bowen L.J. said. The Lord Chief Justice in the present case quotes the remainder of the passage, and this indicates that the word "control" needs explanation and gives some notion of what is necessary before one man's servant becomes pro hac vice the servant of another man. It seems to be assumed in all these cases, no doubt rightly, that the man acquiesces in the temporary change of master, though that may have consequences to him in regard to wages, workmen's compensation, common employment and the like. Bowen L.J. completes his statement thus (1): "There are two ways in which a contractor "may employ his men and his machines. He may contract "to do the work, and, the end being prescribed, the means of "arriving at it may be left to him. Or he may contract in a "different manner, and, not doing the work himself, may place "his servants and plant under the control of another—that "is, he may lend them—and in that case he does not retain "control over the work." It was held on the facts of that case that the latter description applied.

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(1) [1911] 2 Ir. R. 143.
(2) [1921] 2 A. C. 412, 416.
(3) [1893] 1 Q. B. 629, 633.

In his judgment in *Moore* v. *Palmer* (2) Bowen L.J. stated a more concise criterion that "The great test was this, whether "the servant was transferred or only the use and benefit of "his work?" Control is not here taken as the test. There are many transactions and relationships in which a person's servant is controlled by another person in the sense that he is required to obey the latter's directions. Such was the case of *Quarman* v. *Burnett* (3), the authority of which has never been questioned. The defendants there were sued for the negligent driving of a coachman employed by a jobmaster who had contracted with the defendants, who were two ladies, to send horses and a driver for their coach. It is clear that the ladies were intended to direct the times when and the places to and from which they took their drives. That was certainly a measure of control, but what, it was held, was transferred was the use and benefit of the coachman's work. The coachman did not become the servant of the defendants. Instances of this sort are common. In *M'Cartan's* case (4) the use and benefit of the harbour company's crane and its driver were transferred. The driver of necessity had to obey the directions as to lowering and hoisting given by those conducting the operation, but it was held that there was no transfer of employment. Another illustration is afforded by *Cameron* v. *Nystrom* (1). The question there was whether stevedores could plead the defence of common employment against a servant of the shipowner whose vessel they were discharging. The plaintiff had been injured by the negligence of one of the shipowner's servants. It was held that there was no common employment because the negligent employee had not become the shipowner's servant. No doubt, he had in many respects to obey the directions of the shipowners. Lord Herschell L.C., however, thus summed up the position (2): "There was no express agreement with regard to the extent "to which the master and mate should have control over "them [sc. the stevedore's servants]. That control is only to "be implied from the circumstances in which they were "employed. The relation of stevedore to shipowner is a well-"known relation, involving no doubt the right of the master of "the vessel to control the order in which the cargo should be "discharged, and various other incidents of the discharge, but "in no way putting the servants of the stevedore so completely "under the control and at the disposition of the master as to "make them the servants of the shipowner, who neither pays "them, nor selects them, nor could discharge them, nor stands "in any other relation to them than this, that they are the "servants of a contractor employed on behalf of the ship to "do a particular work." Lord Herschell there emphasizes that it is the extent of control which is material to be considered, but he also stresses the other elements which make up the relationship of master and servant and which have to be considered before it can be held that there has been a transfer of the man's service from his general employer to the other who is said to be his temporary employer.

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(1) [1893] 1 Q. B. 629, 633, 634.

(2) 2 T. L. R. 781, 782.

(3) 6 M. & W. 499.

(4) [1911] 2 Ir. R. 143.

It is, I think, clear that the presumption is all against there being such a transfer. Most cases can be explained on the basis of there being an understanding that the man is to obey the directions of the person with whom the employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position, the man who receives directions from the other person does not receive them as a servant of that person, but receives them as servant of his employer. Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and the times at which, the services

(1) [1893] A. C. 308.

(2) Ibid. 312.

are to be performed, being left to the discretion (subject to any contractual limitations) of the other contracting party, there must be someone who is to receive the directions as to performance from the other party and they are given to the employer, whether he receives them personally or by a clerk or by the servant who is actually sent to do the work. That I think is the position here. The contract is of a character very common between the owner of lorries or other vehicles and one who wants to hire them for the conveyance of his goods. In principle the facts here are indistinguishable from those in *Quarman* v. *Burnett* (1). Davison was subject to the control of Holmes, Mullin & Dunn, Ld., only so far as was necessary to enable the respondents to carry out their contract. In doing so he remained the respondents' servant. They paid him and alone could dismiss him. Even in acting on the directions of Holmes, Mullin & Dunn, Ld., he was bound to have regard to paramount directions given by the respondents and was to safeguard their paramount interests. This appears from the course of business followed, and is confirmed by the agreement dated October 11, 1934, made between Holmes, Mullin & Dunn, Ld., and the respondents' predecessors in title in whose shoes it is admitted that the respondents stand. It is a contract which was intended to remain in force and has remained in force over a period of years, and provided for the carriage of petrol or like products to any destination within Northern Ireland at the request of Holmes, Mullin & Dunn, Ld. Clause 9 provides that the employees of the respondents or their predecessors engaged in the delivery should accept the orders of Holmes, Mullin & Dunn, Ld., "regarding such "delivery, the payment of accounts and all matters incidental "thereto." These are just the matters in respect of which, for the convenient performance of the contract, the lorrymen employed would naturally be required to obey the wishes of those for whom the petrol was being carried. I do not find anything in the rest of the agreement to lead to any other conclusion. It is not, however, necessary to make any nice examination of its terms. A question of this sort must be decided on the broad effect of the contract. I do not attach any decisive effect to the proviso to cl. 9 that nothing in the agreement is to be construed to mean that the respondents' employees are to be taken as employees of Holmes, Mullin & Dunn, Ld., because it could not bind third parties. I think, on the whole, that the agreement goes to support the view that the parties did not contemplate that what the agreement stipulated should involve any transference of servants, as contrasted with transference of service.

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(1) 6 M. & W. 499.

Each case of this character must be decided on its particular facts. I, therefore, do not think it necessary to refer to any other of the cases which have been cited. In the great majority the conclusion has been against the servants being transferred from the general employer. Nor do I consider the cases where a man has been held to have become the servant of someone who was not otherwise his employer by voluntarily doing work for him.

On the other question, namely, whether Davison's negligence was in the course of his employment, all the decisions below have been against the appellants. I agree with them and need add little. The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and, at least generally speaking, not for his employer's benefit, but that last condition is no longer essential to fix liability on the employer: *Lloyd* v. *Grace, Smith & Co.* (1). Nor is such an act prima facie negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority. I think what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette in abstraction from the circumstances as a separate act. This was the line taken by the majority judgment in *Williams* v. *Jones* (2), but Mellor and Blackburn JJ. dissented, rightly as I think. I agree also with the decision of the Court of Appeal in *Jefferson* v. *Derbyshire Farmers, Ld.* (3), which is in substance on the facts indistinguishable from the present case. In my judgment the appeal should be dismissed.

(1) [1912] A. C. 716.
(2) 3 H. & C. 602.
(3) [1921] 2 K. B. 281.

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LORD PORTER. My Lords, I agree with the speeches just delivered by the noble and learned lords who have preceded me, and would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Berrymans, for George L. Maclaine & Co., Belfast.*

Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth, for J. C. W. Rea & Son, Belfast.*

[HOUSE OF LORDS.]

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Jan. 13, 14; *Feb.* 9; *Mar.* 4.

BENSON . . . . APPELLANT;

AND

NORTHERN IRELAND ROAD TRANSPORT BOARD . . . . RESPONDENTS.

Criminal law—Appeal—Dismissal of summons—Order for payment of costs by complainants—No appeal—Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 *Geo.* 5, *c.* 13), *s.* 24, *sub-s.* 1—*Road and Railway Transport Act (Northern Ireland),* 1935 (25 & 26 *Geo.* 5, *c.* 15), *s.* 15, *sub-s.* 1.

By s. 24, sub-s. 1, of the Summary Jurisdiction and Criminal Justices Act (Northern Ireland), 1935, "an appeal shall lie to a "court of quarter sessions against an order of a court of summary "jurisdiction, in cases of a civil nature by either party whether "he is the complainant or defendant, and in other cases by any "party against whom an order is made for payment of any penal "or other sum, or for any term of imprisonment, or for the estreating "of any recognizance to a greater amount than twenty shillings."

A court of summary jurisdiction in Northern Ireland having dismissed a summons under s. 15, sub-s. 1, of the Road and Railway Transport Act (Northern Ireland), 1935, for contravention of which a fine of 100*l.* might be imposed, and ordered the complainants to pay a sum in respect of costs, the complainants appealed to quarter sessions, which dismissed the appeal. On a case stated, the Court of Appeal in Northern Ireland held that an offence had been committed and that the decision of the court of summary jurisdiction should be reversed. On appeal by the defendant to the House of Lords:—

Held, that the order for payment of costs was not " an order

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[*] *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD WRIGHT, and LORD PORTER.

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"... . for the payment of any penal or other sum" within s. 24, sub-s. 1, of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, and accordingly since the case was of a criminal nature there was no right of appeal from the dismissal of the summons.

Decision of the Court of Appeal in Northern Ireland [1940] N. I. 133 reversed.

APPEAL from the Court of Appeal in Northern Ireland.

On September 1, 1938, the Northern Ireland Road Transport Board, the respondents, caused a summons to be issued against Albert Benson, the appellant, for using a motor vehicle on a public highway at Belfast on May 3, 1938, for the carriage of certain merchandise for hire or reward without the consent in writing of the respondents and the approval of the Ministry of Home Affairs contrary to s. 15 of the Road and Railway Transport Act (Northern Ireland), 1935 (1), which came into force on July 16, 1935. At the hearing before one of the resident magistrates for the City of Belfast (Mr. W. F. McCoy K.C.) it was admitted that the appellant had carried merchandise as alleged, but it was contended that "goodwill" was "property" within the meaning of s. 5, sub-s. 1, of the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67) (2), and that s. 15 of the Act of 1935 read in conjunction with s. 5, sub-s. 1, of that Act (3) was ultra vires the Parliament of

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(1) By s. 15 of the Road and Railway Transport Act (Northern Ireland), 1935: "(1.) A person "other than the Board shall not "use a motor vehicle on any "public highway for the con-"veyance of passengers or their "luggage or the carriage of "merchandise for hire or reward, "except with the consent in "writing of the Board and the "approval of the Ministry of "Home Affairs . . . . (6.) If any "person uses a motor vehicle in "contravention of this section, he "shall be liable on summary "conviction to a fine not exceeding "one hundred pounds."

(2) By s. 5, sub-s. 1, of the Government of Ireland Act, 1920: "In the exercise of their powers to "make laws under this Act neither "the Parliament of Southern "Ireland nor the Parliament of "Northern Ireland shall make a "law so as either directly or "indirectly to . . . . take any "property without compensation. "Any law made in contravention "of the restrictions imposed by "this sub-section shall, so far as it "contravenes those restrictions, "be void."

(3) By s. 5, sub-s. 1, of the Road and Railway Transport Act (Northern Ireland), 1935: "The Board "shall, within a period of six "months from the day on which "this Act comes into operation ". . . . acquire every road motor "undertaking operated for hire or "reward in Northern Ireland . . . . "In this sub-section the expression "'operated' means operated im-"mediately before the passing of "this Act and providing a road

Northern Ireland on the ground that, since he had not begun to operate his road motor undertaking until after June 1, 1934, and accordingly would receive no payment under s. 6 of the Act of 1935 (1), the joint effect of the relevant sections would be to "take" property of his, to wit the goodwill of his business, without compensation. On February 28, 1939, the resident magistrate dismissed the summons on the merits and ordered the respondents to pay the appellant eight guineas for costs.

The respondents gave notice of appeal to the general sessions of the peace for the county and city of Belfast alleging that they were "aggrieved by the order of the resident magistrate." When the case came before the deputy recorder of Belfast at quarter sessions no objection was taken that in cases of a criminal nature, where a court of summary jurisdiction has discharged the person summoned no appeal lies. On June 19, 1939, the deputy recorder made an order dismissing the appeal and affirming the decision of the resident magistrate.

On June 24, 1939, the respondents applied to the deputy recorder for a case stated for the opinion of the Supreme Court in Northern Ireland. In the case stated he set out that he accepted the contentions on behalf of the appellant and held (1.) that "goodwill" was property "within the meaning "of s. 5, sub-s. 1, of the Act of 1920"; (2.) that qua the appellant the provisions of s. 15 of the Act of 1935 were ultra vires the Parliament of Northern Ireland and (3.) that the decision of the resident magistrate should be affirmed. He further stated that the question for the consideration of the court was whether he was right in so holding. The case stated came on for hearing before the Court of Appeal in Northern Ireland (Andrews C.J., Babington and Murphy L.JJ.) on February 19, 1940, and was further heard on April 16, 1940, when the Attorney-General for Northern Ireland appeared by invitation of the court as amicus curiæ. The constitutional question was elaborately argued, and on May 7, 1940, the court answered the first question in the case stated in the affirmative and (Babington L.J. dissenting) the second and

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"transport service which had "been commenced before the first "day of June, nineteen hundred "and thirty-four. . . ."

(1) By s. 6 of the Road and Railway Transport Act (Northern Ireland), 1935: "In the case of "any undertaking transferred to "the Board under this Act, the "following provisions shall have "effect :—(*a*) The Board shall pay "or issue to the owners of the "undertaking, as consideration "for the transfer, such amount as "may be agreed upon by the "Board and the owners. . . ."

third questions in the negative. Accordingly the court declared "that the said dismiss should be reversed."

The appellant appealed to the House of Lords. During the argument the question was raised by the House as to the competence of the appeals, and their Lordships subsequently ordered this question to be argued. The report is confined to this point.

Whitaker K.C. (of the English Bar and K.C. of the Irish Bar) and *A. J. Belford* (of the Irish Bar) for the appellant. No appeal lies in this case, because there is no appeal from an acquittal. If there were any such right it would have to be found in s. 24, sub-s. 1, of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, replacing s. 24 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93). A person seeking to establish a right of appeal from an acquittal in a criminal matter would have to show that the right was given by words of a statute which were clear, express and free from ambiguity: *Reg.* v. *Tyrone County Justices* (1). In this Act there are no such words.

Charles Romer K.C. (of the English Bar) and *L. E. Curran* (of the Irish Bar) for the respondents. It is difficult to support the procedure here adopted. There were two other methods by which this matter could have been brought to the Court of Appeal (*a*) by case stated on a question of law and (*b*) by resort to s. 50 of the Government of Ireland Act, 1920, which provided that where the validity of an Irish law is questioned an appeal shall lie to the Court of Appeal. The justification of the method adopted rests on the true construction of s. 24, sub-s. 1, of the Act of 1935. As this was a criminal proceeding the question is whether the costs ordered by the magistrate to be paid are a "penal or other sum" so as to give the respondents a right of appeal. It is hard to suggest that costs were intended by the legislature to be included by the words of the sub-section. The position is that owing to an innocent misapprehension as to the interpretation of the sub-section, this matter was taken to appeal and no one suggested that there was anything irregular in the proceeding.

MacDermott K.C. (Attorney-General of Northern Ireland) and *Patton* (of the English Bar) for the Government of Northern Ireland. The counsel for both the appellant and the respondents have really come to the same conclusion on the point for consideration which is important as the Summary Jurisdiction

(1) (1906) 40 Ir. L. T. 181.

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and Criminal Justice Act (Northern Ireland), 1935, is generally recognized as having broken new ground and the words "penal or other sum" in s. 24, sub-s. 1, appear to have a wide application. There is no distinction between English and Irish law in the acceptance of the general principle stated in *Reg.* v. *Tyrone County Justices* (1). In *McMahon* v. *Brooke* (2) heard before the Court of Appeal in Northern Ireland on June 28, 1939, the question arose whether in a criminal matter costs are included in the expression "penal or other sum," but the court held that the matter was of a civil nature.

The House took time for consideration.

1942. Mar. 4. VISCOUNT SIMON L.C. My Lords, by its formal order the Court of Appeal declared "that the said "dismiss should be reversed," and ordered the present appellant to pay costs. The "dismiss" here referred to must be the resident magistrate's dismissal of the complaint, and the reversal of this dismissal must mean that the present appellant was to be convicted. What was to happen then does not appear, but presumably the Court of Appeal's order means that the present appellant, who had already been discharged by the resident magistrate, should be brought before him again, either by summons or, if necessary, by arrest, and should then be fined not more than the maximum of 100*l.* for the offence in respect of which he had been discharged, with the liability of distress of goods in default of payment and the possibility, if the warrant of distress could not be executed, of imprisonment.

Before your Lordships' House the case continued to be conducted as though the only question that could be raised was the constitutional one. After hearing the appellant's counsel and without calling upon the respondent, the House took time to consider how to express its conclusion. In the course of the hearing, the question was put from the House itself to the parties, how it came about that this chain of appeals could be supported, seeing that the appellant in the first instance was discharged by the resident magistrate from the complaint on which the whole chain depended. The answer at that time offered to the House was that the order of the resident magistrate requiring the respondents to pay to the appellant eight guineas costs was an order

(1) 40 Ir. L. T. 181.

(2) (Unreported).

for payment of a "penal or other sum" within s. 24, sub-s. 1, of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, which has taken the place of s. 24 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93).

It appeared to your Lordships, when further considering the matter, that this explanation was of very dubious validity. The reversal pronounced by the Court of Appeal was not limited to the order to pay costs: it was essentially an order that the appellant should, after all, be convicted. Moreover, the proposition that it is the imposition of costs on the prosecutor that creates his right to appeal would lead to the extraordinary result that in Northern Ireland, when a court of summary jurisdiction dismisses a criminal charge, the prosecution, if dissatisfied, should beg to be ordered to pay costs in order thereby to purchase a right of appeal, and the accused, if he wished to make sure of his acquittal, should be astute not to ask for costs against the prosecution. We accordingly asked for further argument as to the right of appeal from the resident magistrate and put the case in the list again for that purpose, when the same counsel attended. The House also had the advantage of the aid of the Attorney-General for Northern Ireland. The upshot is remarkable. There is now no difference of view at your Lordships' Bar, and everybody agrees that there was no right of appeal from the dismissal with costs of the complaint by the resident magistrate. I entirely concur. Rights to appeal exist only by statute. If there were any right of appeal at any stage in this case, the right must be founded upon something contained in s. 24, sub-s. 1, of the Act of 1935.

It cannot be disputed that the alleged breach of s. 15 of the Transport Act, for contravention of which a fine of 100*l.* may be imposed, does not constitute a case "of a civil nature": it is a criminal matter. All that remains is to ascertain whether when the prosecutor fails and is ordered to pay costs, this is "an order . . . for payment of any penal or other sum." This phrase "penal or other sum" is used many times in the Petty Sessions (Ireland) Act, 1851, which is to be read with the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (see s. 65, sub-s. 2, of the last named Act and the Interpretation Act, 1889, s. 13, sub-s. 9). It is plain that the phrase is abundantly satisfied by provisions for penalties, on the one hand, and by provisions for compensation, damages, amends and the like, on the other. An order "for payment of "any penal or other sum" is enforced by distress (see s. 22, para. 2, of the Act of 1851), and by para. 9 of the same section an order for costs "shall be recoverable in the same manner "as any penal or other sum"—a phrase which at once contradicts the impression that an order for costs is itself an order to pay an "other sum." Under the Act of 1851, costs at petty sessions were not to exceed twenty shillings, and since under s. 24 of that Act no appeal to quarter sessions was permitted if the order for payment did not exceed twenty shillings, the question whether an unsuccessful prosecutor could found an appeal on an order requiring him to pay costs could not at that date arise. There is now no limit to the amount of costs that may be ordered (see s. 48, sub-s. 1, of the Act of 1935), but the phrase "recoverable in the same manner "as any penal or other sum" is there repeated and the conclusion that an appeal cannot be founded on an order making the unsuccessful prosecutor pay costs is reinforced. I have not overlooked the language of sch. II. to the Act of 1935, which includes a form of appeal from petty sessions and contains in the margin a reference to the dismissal of a complaint with costs. But the reference there must be understood to be to the dismissal of a complaint in cases of a civil nature.

The unchallenged and unchallengeable conclusion thus arrived at is really nothing more than an illustration of an extremely important and universally accepted principle of our law, and a principle which has been recognized again and again by the highest authorities both in England and in Ireland. Thus, in *Reg.* v. *Tyrone County Justices* (1) Palles C.B. in granting certiorari to quash a conviction for trespassing in pursuit of game, which was pronounced at quarter sessions on the hearing of an appeal from justices who had dismissed the charge, spoke of (2) the "elementary" principle that "an acquittal made by a court of competent "jurisdiction and made within its jurisdiction, although "erroneous in point of fact, cannot as a rule be questioned "and brought before any other court." The Chief Baron went on to point out that the statute 27 Geo. III. c. 35, which was then being discussed, could not be construed to give an appeal to the prosecutor in a criminal matter, for it contained no clear, express words which provided for a departure from the general rule, and he added, "I, therefore, first rest my view "on settled principles, that, before you can appeal against "an acquittal, the words must be clear, express, and free from "any ambiguity." The Chief Baron then referred to *R.* v. *Middlesex Justices* (1), where a district surveyor claimed the right to appeal against the dismissal of his complaint as being a "person aggrieved," and Lord Ellenborough C.J. held that the surveyor was not a "person aggrieved" within the section. The Chief Baron next cited *R.* v. *Tucker* (2) where Abbott C.J. said: "If there be a proceeding by information for a penalty "under a statute, and the justices, after hearing the matter, "refuse to convict the party, that would be equivalent to "an acquittal, and it is perfectly clear that no appeal will lie "to the quarter sessions against an acquittal."

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(1) 40 Ir. L. T. 181.

(2) Ibid. 182.

The broad proposition is summed up in the judgments of Lord Coleridge C.J. and Wills J. in *Reg.* v. *London County Justices* (3). That case arose under the Highway Act, 1835, which imposes a penalty for wilfully obstructing a highway and provides an appeal to quarter sessions by "any person "[who] shall think himself aggrieved by . . . . any order, con-"viction, judgment, or determination made, etc." The decision was that when a summons for wilful obstruction was dismissed by a justice, the informant had no right to appeal. Lord Coleridge said (4): "A person is prosecuted for some breach "of the law which is to be proved in a particular way. The "general principle of law is that, if acquitted, he is not to be "a second time vexed." And he added (5): "Is a person, "who cannot succeed in getting a conviction against another, "a person 'aggrieved'? He may be annoyed at finding that "what he thought was a breach of law is not a breach of law; "but is he 'aggrieved' because someone is held not to have "done wrong?" Wills J. said (5): "Long before the Highway "Act of 1835, there were similar statutory provisions, and yet "no instance can be found in the books of an appeal success-"fully prosecuted, or even attempted to be brought, after an "acquittal."

One other citation may be usefully made from Lord Halsbury's speech in the case of *Cox* v. *Hakes* (6) where the Lord Chancellor insisted upon the need of express legislation before the right of personal freedom can be made subject to the delay and uncertainty of appeal. Lord Halsbury's pronouncement is not irrelevant to the present case, for the question whether a disappointed prosecutor who is ordered to pay costs has a right of appeal from a magistrate's decision to acquit in Northern Ireland may equally well arise where the punishment on conviction would be imprisonment. Lord Halsbury's language is as follows: "Your Lordships are here "determining a question which goes very far indeed beyond "the merits of any particular case. It is the right of personal "freedom in this country which is in debate; and I for one "should be very slow to believe, except it was done by express "legislation, that the policy of centuries has been suddenly "reversed and that the right of personal freedom is no longer "to be determined summarily and finally, but is to be subject "to the delay and uncertainty of ordinary litigation, so that "the final determination upon that question may only be "arrived at by the last court of appeal."

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(1) (1812) 16 East 310.
(2) (1824) 5 D. & R. 434, 440.
(3) (1890) 25 Q. B. D. 357.
(4) Ibid. 360.
(5) Ibid. 361.
(6) (1890) 15 App. Cas. 506, 522.

In the light of the above pronouncements, very clear statutory language would be needed to establish, by way of exception to the general rule, a right of appeal from a decision dismissing a criminal charge, and nothing contained in s. 24 of the Act of 1935 could establish such an exception.

The conclusion that the dismissal of the complaint is final necessarily leads to the view that the whole of the proceedings from the moment that the resident magistrate discharged the appellant are misconceived. Neither the deputy recorder nor the Court of Appeal in Northern Ireland had any jurisdiction to deal with the matter, and this also applies to the House itself. It is irrelevant to consider whether, after the appellant's discharge, the constitutional issue might have been raised by case stated by the resident magistrate, or by using s. 51 of the Government of Ireland Act, 1920. The circumstance that no objection on the score that no appeal lay was ever taken at any stage until it was taken by the House itself does not mend matters from the respondents' point of view. In *Norwich Corporation* v. *Norwich Electric Tramways, Ld.* (1), where an objection to the jurisdiction of the High Court was successfully taken in the Court of Appeal, though it had not been raised at an earlier stage, Vaughan Williams L.J. laid down the true rule when he said: "If the "court in any case is itself satisfied that it has no jurisdiction "to entertain the application made, it is its duty, in my

(1) [1906] 2 K. B. 119, 125.

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"opinion, to give effect to that view, taking, if necessary, "the initiative upon itself."

The appeal to this House must be allowed and, inasmuch as the appellant should never have been vexed by proceedings of appeal at all, he must have his costs both before this House and at each stage below.

LORD ATKIN. My Lords, I entirely agree with the opinion which has just been expressed by my noble and learned friend the Lord Chancellor, and with the motion which has been proposed by him; and inasmuch as we are not differing from the Court of Appeal in Northern Ireland on any point which was argued before them or decided by them, I find it quite unnecessary to add any words of my own.

LORD WRIGHT. My Lords, I also agree, and I do not think it necessary to add anything.

LORD PORTER. My Lords, I concur.

Solicitors for appellant: *Williams & Tremayne, for Wallace, Harris & Robb, Belfast.*

Solicitors for respondents: *Linklaters & Paines, for J. Dunville Coates, Belfast.*

Solicitors for Northern Ireland Government: *Linklaters & Paines, for Chief Crown Solicitors.*

[HOUSE OF LORDS.]

H. L. (E.)*

1942

Jan. 26, 29; Mar. 24.

WESTMINSTER BANK, LIMITED, AND ANOTHER . . . . APPELLANTS;

AND

EDWARDS AND ANOTHER . . . . . RESPONDENTS.

Emergency legislation—War damage—"Multiple lease"—Existence—Question of fact for county court judge—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 *Geo.* 6, *c.* 72), *s.* 24.

The question whether a lease is a "multiple lease" within the definition in s. 24 of the Landlord and Tenant (War Damage) Act,

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* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

1939, is a question of fact whether or not there has been use or adaptation for use as two or more separate hereditaments of the buildings demised and is for the county court judge to determine. If premises are " adapted for use " as separate tenements the lease is rightly regarded as a multiple lease, however they are used.

Decision of the Court of Appeal [1941] 2 K. B. 140 (sub nom. *Hazel* v. *Edwards*) reversed.

APPEAL from the Court of Appeal.

The facts were stated by VISCOUNT SIMON L.C. as follows: The appellants (hereinafter called " the executors ") were the executors of David Hazel (hereinafter called " the lessor "), who by an indenture of lease made on July 25, 1922, demised to the respondents (hereinafter called " the head lessees ") a block of buildings known as 14–18 Nile Street, London, for a term of twenty-one years from September 29, 1922, at a rent of 1700*l.* a year. The premises consisted of a large rectangular building with a basement, ground floor, and four floors above, together with an annexe with a basement, ground floor and first floor. The head lessees had sublet the basement and ground floor of the main building and of the annexe to one Tipper, the first, second and third floors of the main building and the top floor of the annexe to Lovell & Christmas, Ld., who had assigned their sub-lease to Leicester, Lovell & Co., Ld., and the top floor of the main building to one Whiting. There was a common staircase which communicated from the ground to all upper floors and also a lift which served some of the floors. On September 8, 1940, at a time when all these sub-tenancies were subsisting, the premises were damaged by enemy action. The roof and top storey were almost entirely destroyed and the top floor became unusable. Less serious damage was done to the other parts of the building. The lift in the main building and a laboratory in the front part of the first floor of the annexe were destroyed. On September 26, the head lessees gave notice to the lessor of disclaimer of their lease under the Landlord and Tenant (War Damage) Act, 1939, together with particulars of the under leases. The head lessees had already received from Whiting notice of disclaimer of his sub-lease, and on October 11, Leicester, Lovell & Co., Ld., similarly gave notice to the head lessees of disclaimer of their sub-lease. It was not in dispute that, if the letting of the basement and ground floor were separately regarded, the damage to that portion of the building did not justify disclaimer of that sub-lease.

On October 17, 1940, the lessor applied to Judge Engelbach in the Shoreditch county court, under s. 15 of the Act, for the determination of the question whether it was equitable to allow the head lease to be disclaimed either wholly or as respects one or more of the separate tenements comprised therein. In the particulars attached to the application it was stated that the premises comprised in the lease " are used "or adapted for use as two or more separate tenements." The head lessees, who were respondents to the application, in no way disputed that this was a " multiple lease " within the definition in s. 24 of the Act (1). They expressly asserted it, and, consequently, no evidence was called to prove that the demise fell within the definition, and the whole argument before the county court judge was conducted on the basis that it did. The county court judge, who had inspected the premises at the request of the parties, embodied in his findings the statement that the buildings comprised in the lease were "used or adapted for use as two or more separate tenements," and that the lease was a multiple lease. The main question in dispute before the county court judge was whether the only portion of the premises in respect of which it was equitable to allow disclaimer of the head lease was the top storey occupied by Whiting (this was the contention of the lessor), or whether the part disclaimed should also include the intermediate floors occupied by Leicester, Lovell & Co., Ld. (this was the contention of the head lessees). The county court judge decided this issue in favour of the lessor. The head lessees appealed to the Court of Appeal (MacKinnon, Goddard and du Parcq L.JJ.), alleging that the county court judge had made errors in law and that there was no evidence on which he could find that it was not equitable to allow them to disclaim the intermediate tenement. The argument proceeded on these questions until, in the course of the head lessees' reply, the Court of Appeal itself took the objection that the lease of July 25, 1922, was not a multiple lease, and, therefore, did not come within s. 15 of the Act. On that ground the Court of Appeal allowed the appeal, directing that the order of the county court judge should be wholly set aside and that the application to him under s. 15 should be dismissed as incompetent. The executors appealed to the House of Lords.

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(1) By s. 24 of the Landlord and Tenant (War Damage) Act, 1939: "'Multiple lease' means a " lease comprising buildings which " are used or adapted for use as " two or more separate tene- " ments."

M. Turner-Samuels for the executors. The application proceeded on the footing accepted by both parties that this was a "multiple lease" within the definition in s. 24 of the Landlord and Tenant (War Damage) Act, 1939. If that had been in dispute the lessor could have adduced evidence to prove that this was a "multiple lease." The Court of Appeal had no power to take the point that it was not since that point was not raised by either side in the county court. The point whether a lease such as this can be a "multiple lease" was expressly left open by the Court of Appeal in *Boudou* v. *Thornton-Smith* (1).

Safford and *Alan Stevenson* for the head lessees. In the definition of a "multiple lease" in s. 24 of the Act the words "are used or adapted for use" relate to the time when the lease was granted and not to the time when the damage occurred, and this was originally a single letting. It was open to the Court of Appeal to take the point that this was not a multiple lease.

Turner-Samuels replied.

The House took time for consideration.

1942. Mar. 24. VISCOUNT SIMON L.C. This appeal comes before the House in unusual circumstances, for the Court of Appeal (MacKinnon, Goddard and du Parcq L.JJ.) reached its conclusion by itself taking an objection on a matter as to which the parties were not at issue, and which the county court judge had included in his findings of fact. With all respect to the Court of Appeal, and to the careful and elaborate judgment of Goddard L.J. delivered on behalf of the court, I find this way of disposing of the case impossible to accept. The question whether a lease of premises is a multiple lease within the definition is a question of fact as to use or adaptation for use, though, no doubt, if the detailed facts are set out, there may sometimes be also a question of law whether the facts can support the conclusion. In the recent case of *Herrmann* v. *Metropolitan Leather Co., Ld.* (2), Uthwatt J. correctly treated a dispute whether a lease was a multiple lease as a question to be decided on evidence. If the question of fact were in issue between the parties, it would be necessary to have evidence on these matters and it might be that architects or surveyors would be called as to the nature of the structure and that the series of sub-leases would be produced and examined. None of these things was done at the trial because the whole matter was agreed. The Court of Appeal lays down the proposition (1) that the lease of a single hereditament does not become a "multiple lease" within the definition of s. 24 "merely because the tenant, "there being no covenant to the contrary in the lease, sublets "portions of that which was let to him as a whole." I must not be understood to accept this proposition, but, even if it were correct, where is the ground for saying that this is the reason, and the only reason, why the parties in the present case agreed that they were dealing with a multiple lease? If the premises were "adapted for use" as separate tenements, the lease is rightly regarded as a multiple lease, however the premises were used. Goddard L.J.'s judgment includes the statement (2) that after the premises were demised to the head lessees they were used by them as a warehouse. No statement to this effect can be found in the county court judge's notes or in his judgment, and both counsel affirmed to us that no such statement or admission was made. Even if the fact were so, this would not prove that this was not a multiple lease. I am forced to the conclusion that there were no sufficient materials before the Court of Appeal to support the ruling that this lease was not a multiple lease.

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(1) [1941] 1 K. B. 561, 567.

(2) [1942] Ch. 248.

Moreover, the question was not in issue. There are, of course, cases in which a court should itself take an objection of its own motion, even though the point is not raised by any of the parties before it. A court is not required to entertain a case which is brought before it only by collusion or other abuse of process. To give an absurd instance, a court cannot be required to decide what are necessaries for an infant if the parties collusively agree to treat the purchaser of the goods as under age when he is not under age at all, but, in the present case, there is no collusion or pretence of any kind. Again, a court not only may, but should, take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus, an appellate court not only may, but must, take the objection that it has no jurisdiction to hear an appeal if it is apparent that no right of appeal exists. Vaughan Williams L.J. in *Norwich Corporation* v. *Norwich Electric Tramways Co., Ld.* (3), formulated the proposition thus: "If

(1) [1941] 2 K. B. 140, 144.
(2) Ibid. 140.
(3) [1906] 2 K. B. 119, 125.

"the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in "my opinion, to give effect to that view, taking, if necessary, "the initiative upon itself," and, as that case shows, this rule applies even though the objection might have been taken, but was not, by the court below. A very recent example of this principle is provided by the decision of this House in *Benson* v. *Northern Ireland Road Transport Board* (1). It is true that the jurisdiction of the county court judge to make an order under s. 15 of the Landlord and Tenant (War Damage) Act, 1939, arises only in relation to a multiple lease, but whether the lease is a multiple lease is (subject to possible appeal on questions of law arising out of facts found) a matter for the county court judge to decide. There are some valuable observations bearing on this subject in the judgment of the Judicial Committee, pronounced by Sir James Colvile, in *Colonial Bank of Australasia* v. *Willan* (2). That was a case in which the question arose whether a writ of certiorari should issue on the ground of want of jurisdiction in the lower court, and in the judgment the various circumstances in which want of jurisdiction may be said to arise are carefully distinguished. The passage relevant for present purposes is as follows: "An "objection that the judge has erroneously found a fact which, "though essential to the validity of his order, he was competent "to try, assumes that, having general jurisdiction over the "subject-matter, he properly entered upon the inquiry, but "miscarried in the course of it. The superior court cannot "quash an adjudication upon such an objection without "assuming the functions of a Court of Appeal, and the power "to re-try a question which the judge was competent to "decide." Here not only did the parties agree that the lease was a multiple lease, but the county court judge, after inspecting the premises, included among his findings an express decision to this effect.

In this situation your Lordships would be justified in allowing the appeal and remitting the case to the Court of Appeal to be dealt with on the basis that this is a multiple lease. The result, however, would be to inflict on the parties further expense where they cannot be held responsible for the complication which has arisen. I think that the interests of justice and the proper dispatch of business would be better served if we dealt here and now with the issues which counsel for the respondents

(2) Ante, p. 520. (3) (1874) L. R. 5 P. C. 417, 443.

wished to raise in the court below. But this must not be taken as a precedent. Looking at the grounds of appeal to the Court of Appeal (which, of course, must be grounds in point of law), the first three grounds are as to the admissibility of evidence as to certain repairs and the like. It does not appear that any such objection was taken before the county court judge and, in any case, he was, I think, entitled to have before him such evidence, which might well help him to decide what, on the whole, was the equitable decision to make. There was a further ground of appeal to the effect that the judge had no evidence on which he could find that it was not equitable to include in the disclaimed tenement the middle block sublet to Leicester, Lovell & Co., Ld. "Equitable" in s. 15 has no technical sense. It merely means "fair." It is only necessary to look through the county court judge's note of evidence and argument to see that this was the main matter of contention before him and that evidence on either side bore on this question. It was for the judge to decide. Before this House, Mr. Safford has sought to raise a further point, namely, that when the county court judge had decided that it was equitable to allow the head lease to be disclaimed only as regards the top tenement (in respect of which it was agreed that 200*l.* ought to be taken off the head rent of 1700*l.*), he was bound, in giving consequential directions as to the apportionment of the "rent," to attribute to the rest of the premises, as between head lessees and lessor, a rent of 1500*l.*, whereas in fact he fixed for this a maximum figure of 1350*l.* One answer to this is that, before the county court judge, evidence to support this cutting down of the head rent attributable to the part of the property not disclaimed was not objected to, though there was difference as to the exact figure. The lessor proposed it and the head lessee naturally did not resist. The reduction presumably reflects the fact that, even after the retained premises have been repaired, the value to the occupier owing to war damage will still be less than it would be if the air raid had not taken place. Moreover, an offer by the lessor to alter the rent is one of the matters to which the court is to have regard in reaching its conclusion under sub-ss. 3, 4 and 5 of s. 15.

The appeal must, therefore, be allowed and the order of the county court judge be restored in its entirety. In the course of its judgment the Court of Appeal made some observations of a general kind as to the conditions which must be satisfied

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before a lease can be regarded as a multiple lease and as to the date at which these conditions must be satisfied. I should myself have thought that there might be much to be said for the view that the relevant date is not the date when the lease was granted, but the date when the application to the court was made, but this is not a matter which has been argued before us, and I, therefore, do not say more than that the propositions included in the judgment of the Court of Appeal should not be regarded as settled law. It may be necessary to decide them on more mature consideration in a case where they are in issue. The executors should have their costs here and below.

My Lords, my noble and learned friends LORD ATKIN and LORD ROMER, who are not able to be here to-day, authorize me to say that they concur in this opinion.

LORD WRIGHT. My Lords, as your Lordships are reversing a unanimous judgment of the Court of Appeal, I have thought it right to add a few observations on my own part to what has fallen from my noble and learned friend the Lord Chancellor.

The gist of the judgment under appeal is summed up in the words of Goddard L.J., speaking for the court. He said (2): "Although in the county court both sides accepted the position " that this was a case of a multiple lease, on the appeal this " court took the point whether the whole proceedings were " not misconceived in that as between these parties the lease " could not be regarded as multiple." Finally he added (1): " The order of the court below is set aside and the application " under s. 15 is dismissed as incompetent." Now, it is clear that a court is not only entitled but bound to put an end to proceedings if at any stage and by any means it becomes manifest that they are incompetent. It can do so on its own initiative, even though the parties have consented to the irregularity, because, as Willes J. said in *City of London Corporation* v. *Cox* (3), in the course of giving the answers of the judges to this House, " mere acquiescence does not give jurisdiction." In *Farquharson* v. *Morgan* (4) Lord Halsbury states the principle thus: " It has been long settled that, where an " objection to the jurisdiction of an inferior court appears " on the face of the proceedings, it is immaterial by what " means and by whom the court is informed of such objection.

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(1) [1941] 2 K. B. 140, 143.

(2) Ibid. 145.

(3) (1866) L. R. 2 H. L. 239, 283.

(4) [1894] 1 Q. B. 552, 556.

" The court must protect the prerogative of the Crown and " the due course of the administration of justice by prohibiting the inferior court from proceeding in matters as " to which it is apparent that it has no jurisdiction." That was a case of prohibition, but I think the general principle applies equally to the duty of the court to take the objection when it becomes apparent in the course of proceedings before it in an appeal. This was the view of a Divisional Court, composed of Bray and Lush JJ., in *Simpson* v. *Crowle* (1), and I agree with it. These two authorities last cited were county court cases, but it is clear that the same principle applies on appeals from the High Court or from any court. The broad principle is stated and illustrated by Vaughan Williams L.J. in *Norwich Corporation* v. *Norwich Electric Tramways Co., Ld.* (2), cited by the Lord Chancellor, where it was seen on looking at the record and the Act under which the proceedings were taken that the court's jurisdiction had been ousted. That was a case of what Willes J. (3) called a patent, as distinct from a suggested, defect. In the latter case the defect is not apparent from the record, but is something collateral or extrinsic. In *Reg.* v. *Bolton* (4) a rule for a certiorari had been directed to justices for the purpose of impeaching their decision. The rule was discharged. Lord Denman C.J., delivering the judgment of the Court of Queen's Bench, after pointing out (5) that the inquiry was " limited " to this, whether the magistrates had jurisdiction to " inquire and determine, supposing the facts alleged in the " information to be true," and after deciding that there was no irregularity shown on the face of the proceedings, refused to consider any question of fact. " We forbear," he said (6), " to express any opinion on that which is not " before us, the propriety of the conclusion drawn from the " evidence by the magistrates: they and they alone were " the competent authority to draw it; and we must not " constitute ourselves into a court of appeal where the statute " does not make us such, because it has constituted no other." To the same effect it was said in *Colonial Bank of Australasia* v. *Willan* (7), " the question " [in such cases] " is whether the " inferior court had jurisdiction to enter upon the inquiry,

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(1) [1921] 3 K. B. 243.
(2) [1906] 2 K. B. 119, 125.
(3) L. R. 2 H. L. 239, 282.
(4) (1841) 1 Q. B. 66.
(5) Ibid. 75.
(6) Ibid. 76.
(7) L. R. 5 P. C. 417, 444.

" and not whether there has been miscarriage in the course " of the inquiry."

These principles are very pertinent for the connsideration of the course adopted by the Court of Appeal. The application in the county court was specifically based on s. 15 of the Landlord and Tenant (War Damage) Act, 1939, which is limited to what the Act denominates multiple leases, as defined in s. 24 of the Act. The particulars under the application alleged the facts relied on as necessary to satisfy that definition in respect of the premises. The case proceeded on the basis that the premises satisfied the definition of a multiple lease. That was not questioned throughout. As was said by Davey L.J. in *Farquharson* v. *Morgan* (1) though in the county court there is no record, strictly speaking, for the purposes of the rule that in cases of a patent defect of jurisdiction the excess must be apparent on the face of the record, the matter does not " depend on the existence " of a formal record, but is one of substance, whether the " defect is apparent or depends on evidence." The proceedings in the county court are for this purpose equivalent to a record. It is clear to my mind that here there was no apparent defect, by which in this context is meant that on the proved or admitted facts on the record the defect is clear as a matter of law. It is true that the application was based simply and solely on s. 15, and that unless the lease was a multiple lease there was no jurisdiction to proceed under the section, but on the face of the proceedings all conditions requisite to enable or require the court to enter on the inquiry were satisfied. Whether there was or was not a multiple lease was a mixed question of fact and law. If the county court judge found the facts wrongly, that would be a miscarriage in the course of proceedings duly initiated. His finding of fact would all the same be final. An error in law on the part of the county court judge would be appealable if the point had been taken by the appellant before the judge (s. 105 of the County Courts Act, 1934, replacing with the same effect s. 120 of the County Courts Act, 1888, as to which see *Smith* v. *Baker & Sons* (2). These matters, however, which affect an appeal, are not material when considering the intervention of the court on the ground of want of jurisdiction, any more than they would be if the proceedings were for a prohibition. What is here material is that the issue whether or not the lease was

(1) [1894] 1 Q. B. 552, 563.

(2) [1891] A. C. 325.

a multiple lease could not be reopened without a retrial, which is beyond the competence of the court on a suggestion of want of jurisdiction. A decision that the lease was or was not a multiple lease depends on fact as well as law. There was a finding here by the judge on the facts that it was a multiple lease, and, indeed, both parties had accepted the proposition that it was. Even if the Court of Appeal were disposed to think that the admission may have been to some extent based on a particular construction of the statutory definition which in their judgment was not justified, the court could not act on that view without more. The facts would need to be investigated on that footing and the whole matter reopened, but, as things stand, such a course would not be admissible. The objection to the jurisdiction could not be taken unless it was patent or apparent on the face of the record. Affidavit evidence is, no doubt, admissible where it is sought to establish a latent or suggested defect, that is, where, for example, in the words which the Lord Chancellor has quoted from *Colonial Bank of Australasia* v. *Willan* (1) there are "objections founded on the personal incompetency "of the judge, or on the nature of the subject-matter or on "the absence of some essential preliminary." Such and similar objections may, and generally can only, be taken by affidavit, because they are generally extrinsic to the matter impeached, but there is nothing of the sort here.

It may be that in some cases there is a narrow line between matter proper for appeal and matter going to the jurisdiction. The narrowness of the line is illustrated by the difference of opinion in *Rex* v. *Woodhouse* (2), where Vaughan Williams and Stirling L.JJ. took one view on this matter, and Fletcher Moulton L.J. another. But in the present case, in my opinion, the line of demarcation is clear. I do not think the Court of Appeal could justify their decision without a complete reconstruction of the facts and evidence in the case, but that is not within their competence. There was no defect of jurisdiction apparent on the face of the proceedings. The Court of Appeal have suggested a construction of the definition of multiple lease contained in s. 24 of the Act. I agree, however, with the Lord Chancellor in thinking that the relevant date is not the date when the lease was granted, but the date when the application to the court was made. The point has not been argued before us, and I am content, like the Lord Chancellor,

(1) L. R. 5 P. C. 417, 443.

(2) [1906] 2 K. B. 501.

to say here that the propositions included in the judgment of the Court of Appeal should not be regarded as settled law. I think the point must be treated as open for future decision. I agree that the appeal should be allowed.

LORD PORTER. My Lords, I have had an opportunity of reading the speech delivered by the Lord Chancellor and only add to what he has said to show why I find myself unable to accept the views of the Court of Appeal.

So far as concerns the substantive matters dealt with by the county court judge and left undetermined by the Court of Appeal, I can find nothing wrong in principle with his decision and on questions of fact your Lordships, like any other appellate tribunal, are bound by his findings if they have evidence to support them. Save on one point, however, the Court of Appeal did not deal with his findings in fact or in law. They thought that the lease of the premises which they had to consider was not a multiple lease, and that they, therefore, had no jurisdiction. As I understand their decision, they considered themselves able to deduce from the terms of the lease itself that at the time at which it was granted the premises were not used or adapted for use as two or more separate tenements. Accepting, without deciding, the argument that the date when the lease was granted is the proper time to determine whether the lease is a multiple one or not, I still find myself unable to accede to their views. A multiple lease is in its very nature granted as one, not as a number of leases. To constitute it there must be premises used or adapted for use as two or more tenements, but the lease must be one. There may possibly be leases whose terms are so clear as to show that they cannot be multiple, though I find it difficult to envisage such a result inasmuch as the buildings comprised in the lease might still be adapted for use as separate tenements, and I do not see how a court could reach a conclusion on this point without evidence. But in the present case there appears to be no ground for asserting that the premises were not at the time when the head lease was granted in fact either used as two or more separate tenements or adapted for such use. Indeed, the county court judge found as a fact that the lease was a multiple one and he had inspected the premises. The Court of Appeal, I think, took the view that the county court judge arrived at his conclusion of fact by considering only the state of the premises when the war damage took place, and thought that, if he had considered the state of affairs on the granting of the lease, he must have arrived at a different conclusion. In this I think they were mistaken. I have been unable to find any evidence other than the wording of the lease on which this assumption could be based. The issue was not in controversy. There was no question of a collusive agreement between the parties to represent that as a multiple lease which in fact was not one, and the county court judge was satisfied. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *H. C. Morris, Woolsey, Morris & Kennedy.*

Solicitors for respondents: *Waller, Neale & Houlston.*

[PRIVY COUNCIL.]

J. C.*
1942
Apr. 23.

REX . . . . APPELLANT;

AND

WILLIAMS AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Revenue—Succession duty—Shares in company—Certificates, signed and endorsed in blank, physically out of province—Shares effectively transferable in either of two legally established transfer offices—Situs for purposes of duty—Succession Duty Act, 1934 (24 *Geo.* 5, *c.* 55), *s.* 6, *sub-s.* 1—*Ontario Companies Act, R. S. O.,* 1937, *c.* 251, *ss.* 56, 60, 101, 102.

A testator, who died domiciled in the State of New York, owned shares in a company incorporated under the Ontario Companies Act, 1937, which had its head office in Ontario and purported to have two agency offices, one in Toronto, Ontario, and the other in Buffalo, in the State of New York, where shareholders might have their stock registered and transferred in the books of the company. The share certificates, which at all material times were physically located in the State of New York, were under the seal of the company, and the endorsements on the back of the certificates of forms of transfer of the shares and the appointment of an attorney for that purpose were signed by

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* *Present:* VISCOUNT MAUGHAM, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD CLAUSON.

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the testator leaving the names of the transferees and of the attorneys in blank. On a claim by the Crown in right of the Province of Ontario to succession duty on the ground that the shares were at the date of the death situate in the province within the meaning of s. 6, sub-s. 1, of the Succession Duty Act, 1934, of Ontario :—

Held, that there was nothing in the Ontario Companies Act, 1937, or in the by-laws of the company to preclude it, in the exercise of its common law powers, from legally establishing a transfer office in a place outside the province, and, accordingly, the shares at and before the death of the testator could be effectively dealt with, and were transferable, both in Toronto and in Buffalo. " Effectively dealt with " means as between the shareholder and the company.

Brassard v. *Smith* [1925] A. C. 371, and *Erie Beach Co.* v. *Attorney-General for Ontario* [1930] A. C. 161, examined and discussed.

The principle in *Brassard* v. *Smith* (*supra*), that the situs of shares in a company is where they can be effectively dealt with, has not lost all weight even if a choice has to be made between more than one place where the shares can be effectively transferred, and one or other of two possible places must be selected on a rational ground. The existence in Buffalo at the date of the testator's death of certificates in his name, endorsed by him in blank, was decisive, for in a business sense the shares could effectively be dealt with in Buffalo and not in Ontario, since the certificates so signed and endorsed were not mere evidence of title, but were valuable documents situate in Buffalo and marketable there, and a transferee was capable of being registered as holder there without leaving the State of New York or performing any act in Ontario, whereas in Ontario nothing effective could lawfully be done there without producing the certificates, and the legal personal representatives could not be compelled to part with them to enable transfers to be effected in Ontario rather than at Buffalo. The shares were, accordingly, not subject to succession duty in Ontario.

Rex v. *National Trust Co.* [1933] S. C. R. (Can.) 670, referred to.

The share certificates were not of the nature of specialties, and the fact that they were under seal could not be treated as establishing that they must be regarded as situate where they were found at the death of the testator.

In re Drogheda Steam Packet Co., Ld. (1903) 1 Ir. R. 512 ; *Smith* v. *Cork & Bandon Ry. Co.* (1870) Ir. R. 5 Eq. 65 ; and *In re Artizans' Land & Mortgage Corporation* [1904] 1 Ch. 796, referred to.

Judgment of the Court of Appeal for Ontario [1940] O. R. 403, affirmed.

Appeal (No. 19 of 1941) from a judgment of the Court of Appeal for Ontario (November 16, 1940) affirming a judgment of McTague J.A. (May 15, 1940).

The following facts are taken substantially from the judgment of the Judicial Committee. The question in this appeal was whether 10,200 fully paid shares of the capital stock of Lake Shore Mines, Ld., a company incorporated by letters patent, dated February 25, 1914, issued under the Ontario Companies Act, which belonged at the date of his death, on July 22, 1934, to the late Alexander Duncan Williams (the testator), an American citizen, who died domiciled in the city of Buffalo, in the State of New York, were at the date of the death situate in the Province of Ontario within the meaning of s. 6, sub-s. 1, of the Succession Duty Act, 1934, of Ontario (1),

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(1) By Succession Duty Act, 1934, s. 6, sub-s. 1: "All property "situate in Ontario and any "income therefrom passing on "the death of any person, whether "the deceased was at the time of "his death domiciled in Ontario "or elsewhere, and every trans"mission within Ontario owing to "the death of a person domiciled "therein of personal property "locally situate outside Ontario "at the time of such death, shall "be subject to duty at the rates "hereinafter imposed."

By Ontario Companies Act, 1937, s. 56, sub-s. 1: "The shares "of the company shall be deemed "personal estate and shall be "transferable on the books of the "company in such manner and "subject to such conditions and "restrictions as by this Act, the "special Act, the letters patent, "supplementary letters patent or "by-laws of the company may be "prescribed." Sub-sect. 2: "Sub"ject to s. 58, no by-law shall be "passed which in any way restricts "the right of a holder of paid-up "shares to transfer the same, but "nothing in this section shall "prevent the regulation of the "mode of transfer thereof."

Sect. 60: "No transfer of "shares, unless made by sale "under execution or under the "order or judgment of a compe"tent court, shall, until entry "thereof has been duly made, be "valid for any purpose whatever, "save only as exhibiting the "rights of the parties thereto "towards each other, and, if "absolute, as rendering the trans"feree and the transferor jointly "and severally liable to the com"pany and its creditors until "entry thereof has been duly "made in the books of the com"pany."

Sect. 101: "The corporation "shall cause the secretary, or "some other officer specially "charged with that duty, to keep "a book or books wherein shall "be kept recorded—(*a*) a copy of "the letters patent and of any "supplementary letters patent "issued to the corporation and, if "incorporated by special Act, a "copy of such Act, and the by"laws of the corporation duly "authenticated; (*b*) the names, "alphabetically arranged, of all "persons who are and who have "been shareholders or members "of the corporation; (*c*) the post "office address and calling of "every such person while such "shareholder or member; (*d*) the "names, post office addresses and "callings of all persons who are or "have been directors of the cor"poration, with the date at "which each person became or so as to render the respondents, the executors of the testator, liable for succession duty in Ontario. The share certificates, which at all material times were physically located in the State of New York, were, pursuant to para. 17 of by-law No. 2 of 1914, under the seal of the company, and the endorsements on the back of the certificates of forms of transfer of the shares and the appointment of an attorney for the purpose were signed by the testator, leaving the names of the transferees and of the attorneys in blank. At the date of the death the company, whose head office was in Ontario, purported by resolutions to have established two offices where transfers of its shares might properly be made in the books of the company, one in Toronto, Ontario, and one in Buffalo, in the State of New York. The respondents, who had obtained letters probate of the testator's will in the State of New York, and subsequent ancillary letters probate in Ontario, where he possessed other property apart from the shares in question, began the proceedings out of which this appeal arose by petition of right claiming a refund of $65,336.17 succession duties paid under protest to the treasurer of Ontario in respect of the shares.

Lake Shore Mines, Ld., was authorized by its charter "to "hold meetings of its shareholders, directors and executive "committee outside of the Province of Ontario" (s. 53). No Order-in-Council had been passed under s. 102, sub-s. 3, of the Companies Act relieving the company from the necessity of keeping the books mentioned in ss. 101 and 107 of the Act at its head office in Ontario.

McTague J.A., sitting as a judge of first instance, granted the respondents a declaration that the shares were not

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"ceased to be such a director; and "in the case of a corporation having "share capital,—(*e*) the number of "shares held by each share-"holder; (*f*) the amounts paid in, "and remaining unpaid respective-"ly, on the shares of each share-"holder; (*g*) the date and other "particulars of all transfers of "shares in their order."

Sect. 102, sub-s. 1: "The books "mentioned in ss. 101 and 107 "shall be kept at the head office of "the corporation within Ontario, "whether the company is per-"mitted to hold its meetings out "of Ontario or not." Sub-sect. 3: "Upon necessity therefor being "shown and adequate assurance "given that such books may be "inspected within Ontario by any "person entitled thereto after "application for such inspection "to the Provincial Secretary, the "Lieutenant-Governor in Council "may relieve any corporation "permitted to hold its meetings "out of Ontario from the provis-"ions of this section upon such "terms as he may see fit."

property situate in Ontario passing on the death, and were not subject to succession duty, and that they were entitled to a refund of the duty paid, and his decision was affirmed unanimously on appeal by the appellant to the Court of Appeal for Ontario (Robertson C.J.O., Middleton, Masten, Fisher and Henderson JJ.A.). The appeal is reported at [1940] O. R. 403.

The Crown appealed.

1942. Feb. 24, 25, 26; Mar. 2, 3. *Pritt K.C.* and *Gahan* for the appellant. Shares in a company are situated where they can be effectively dealt with and transferred, and the real question is whether the establishment of the transfer agency in Buffalo was a valid and lawful act, making it possible to transfer the shares there without having in any way to resort to the Province of Ontario. The pretended establishment of the transfer agency in Buffalo was an ineffectual or unlawful act. However convenient it may be to carry out transfers there, they are not complete until they are entered in the books of the company, and these books are kept in Ontario. In *Attorney-General* v. *Higgins* (1) it was said "the evidence of title to these shares is the register "of shareholders, and that being in Scotland this property is "located in Scotland" (2). The true test of situs was said in *Brassard* v. *Smith* (3) to be "where the shares could be "effectively dealt with." Where there are two registers, the answer to the point as to "effectively dealt with" may well be to go to the place where the principal register is. *Erie Beach Co.* v. *Attorney-General for Ontario* (4), on which reliance is placed, gets a little nearer to this particular problem, but does not seem to have carried the matter much further than *Brassard* v. *Smith* (3). Of the English cases *In re Clark. McKecknie* v. *Clark* (5) is not directly in point. [Reference was also made to *Baelz* v. *Public Trustee* (6).] There are several Canadian decisions on similar lines to *In re Macfarlane* (7), but they do not give much assistance: *Rex* v. *National Trust Co.* (8). In *In re Macfarlane* (7) there was a register of a Dominion company at the place where the shareholder died, and the shares were there, and it was held that that was the locality of the

(1) (1857) 2 H. & N. 339.
(2) Ibid. 351.
(3) [1925] A. C. 371.
(4) [1930] A. C. 161.
(5) [1904] 1 Ch. 294, 298.
(6) [1926] Ch. 863.
(7) (1933) O. R. 44.
(8) [1933] S. C. R. (Can.) 670, 673, 677.

shares, but there is nothing specifically justifying the assertion that that rule was applied as a matter of principle. [LORD MACMILLAN. *English Scottish and Australian Bank, Ld.* v. *Inland Revenue Commissioners* (1) is of interest for the general observations therein.] On the facts of the present case the situs of the shares is Ontario. The effect of *Toronto General Trusts Corporation* v. *The King* (2) is that the fact that transfer can be effected legally in two places cannot fix the situs, which is there fixed almost tacitly by the only other thing available, the domicile of the de cujus. There does not appear to be any provision in the Dominion Companies Act about shifting from register to register, but there is definite provision in the Bank Act, 1923, c. 32, s. 42, sub-ss. 4, 5, 6. The conduct of the business in *Attorney-General of Nova Scotia* v. *De Lamar* (3) was the same as in the present case, but there there was legislation which got rid of the provision about keeping the register at the head office. *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (4) does not affect this case, and is not an authority of the Supreme Court of Canada against the appellant's contentions. *In re Thoburn. Ivey* v. *The King* (5) at first sight looks rather against those contentions, but when examined does not seem to have much bearing. [Reference was then made to the relevant sections of the Ontario Companies Act as set out above.] To get a valid transfer Mr. Williams or his executors or other transferees would of necessity have to come into the Province of Ontario to get the matter effectively dealt with. Sect. 56 gives a positive method of transfer, and provides no other, and, therefore, you can only transfer on the books of the company in such manner as is prescribed by the Act. Sect. 60 enacts that the transfer is invalid until the entry has been duly made in the books of the company; the transfer books referred to in s. 56 are, it is submitted, included in the books mentioned in s. 101, and have, therefore, under s. 102, to be kept at the head office of the company in Ontario. There is no provision in the Act for the establishment of a branch register. If it is sought to make out that the register in Buffalo is a register in the full sense, so that one can get complete title, then the books ought to be taken to Ontario, because the Act says that they must be kept there. There is no way out of that dilemma. In the end title will depend on what is in *the* register, which by s. 102 is kept, and must be kept, at the head office. [Counsel was not required to deal with the question whether the share certificates were specialties.] Finally, these shares have not in fact been endorsed. No doubt, Mr. Williams signed them, but an endorsement for the present purpose must be completed by delivery and there is no evidence that the testator ever handed them to anybody.

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(1) [1932] A. C. 238.
(2) [1938] 1 D. L. R. 40.
(3) (1922) 61 D. L. R. 251.
(4) [1931] S. C. R. (Can.) 170, 182, 189.
(5) [1939] 1 D. L. R. 631, 643.

Charles Romer K.C. and *Raymond Jennings* for the respondents. The views and conclusions adopted in the courts below on the questions at issue were right, and as the executors have paid duty on the shares in the State of New York they ought not to have to pay further duty under the Ontario Succession Duty Act. The appellant's contention that s. 60 of the Ontario Companies Act, which provides that no transfer of shares shall be valid for any purposes until entry in the books of the company and that " books of the company " there means the books referred to in s. 101, which, by reason of s. 102, have to be kept at the head office is not correct. While it is true that s. 60 deprives a transfer of validity until an entry is duly made in the books of the company, there is no reason—and there are elements against it—for linking up the books of the company there with certain books which for purposes of information have to have particular matters entered in them and are to be kept at the head office. The reason for ss. 101 and 102 is to be found partially in s. 74 and partially in s. 105. The mode or manner of transfer is left to the directors to be determined by by-law. Contrary to the view of the appellant that every transfer has been ineffective if not entered in the books at the head office, a transfer is binding on the company if it is effected at one of the transfer agencies, unless it is invalidated by reason of the provisions of s. 60. It does not matter where the transfer takes place, provided that the persons regarded by the legislature as having an interest in the matter have accurate and full information specified in detail under s. 101 made available to them at a particular place. To attribute to s. 60 the very rigid construction sought for by the appellant would not only result in the greatest possible inconvenience to a number of people, but would be whittling down the powers conferred on the directors by s. 91 and, in a modified form, by s. 56.

The head office was transferred from Haileybury to

Kirkland, which is 300 or 400 miles from the transfer agency at Toronto. The agencies carry out the transfers without reference to the head office. Sect. 206 of the Dominion Companies Act, 1934, draws a clear distinction between a book in which transfers are entered and carried through and another at the head office in which particulars of those transfers are to be recorded for the purpose of inspection: *In re Thoburn. Ivey* v. *The King* (1). These shares can be effectively dealt with in Buffalo. The headnote in *Erie Beach Co.* v. *Attorney-General for Ontario* (2) appears to have put a gloss on the decision of the Judicial Committee which is not warranted, and the case has given rise to a certain amount of misunderstanding in Canada, but in that case there was a prohibitive by-law which prevented transfers except at the head office. In *Treasurer of Ontario* v. *Blonde* (3) the shareholder died in Ontario, with the shares in his possession there, but they could only be transferred in Michigan or New York, and it was held that they were not liable to Ontario succession duty. [Reference was made to *Colonial Bank* v. *Cady and Williams* (4) and *Stern* v. *The Queen* (5).] In *In re Clark. McKecknie* v. *Clark* (6), where there were equal means of effectively transferring the shares—in South Africa and in England—and possession of the certificate was essential to complete the title to them, it was held on that ground that they were situated in England. Whatever test is applied with a view to establishing that these shares were property situate in Ontario, it breaks down. If regard be had to *Stern's* case (5), that the place is where the shares could be cashed, that also was in Buffalo, because the share certificates were there. Even assuming that the construction of the Ontario Companies Act contended for by the respondents is wrong, it does not necessarily follow that the shares were situate in Ontario; on that hypothesis a purchaser of the shares would not get a registered title, that would remain where it was, but he would get every right except the right to vote; he would have to go to Ontario to complete his title. Reliance is placed on *Attorney-General of Nova Scotia* v. *De Lamar* (7), which is very much in point in the present case. Since this matter was before the Court of Appeal for Ontario *Treasurer of Ontario*

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(1) [1939] 1 D. L. R. 631.
(2) [1930] A. C. 161.
(3) [1941] O. R. 227.
(4) (1890) 15 App. Cas. 267.
(5) [1896] 1 Q. B. 211.
(6) [1904] 1 Ch. 294.
(7) 61 D. L. R. 251.

v. *Blonde* (1) has decided that share certificates are not specialties. [Reference was also made on that question to *In re Artizans' Land & Mortgage Corporation* (2), in which Byrne J. followed *In re Drogheda Steam Packet Co.* (3).]

Raymond Jennings, following. If the words of the Act are clear the Board are not concerned with any question of justice or convenience, but these matters may be taken into account if there is ambiguity in the Act: *In re Robb's Contract* (4). To decide in favour of the appellant would result in double duty being payable, which is consonant neither with justice nor convenience.

Pritt K.C. replied.

Apr. 23. The judgment of their Lordships was delivered by Viscount Maugham who, after stating the facts, continued: In this case there is no question of a transmission within Ontario, and it is admitted that the deceased was domiciled in the State of New York. The question, then, is the simple one: Were the shares in question property situated in Ontario? If they were, the appellant is entitled to the duty in right of the province. If they were not, the sum paid ($65,336) for duty in respect of the shares with interest was rightly ordered to be repaid to the respondents by the judgment under appeal and the judgment should be affirmed. It was contended on behalf of the appellant that the company had no power to provide that its shares could effectively be transferred in the city of Buffalo. If this contention is well founded the appeal should succeed. If it fails other questions will arise for decision.

Shares in a company are " things in action " which have in a sense no real situs, but it is now settled law that for the purposes of taxation under such a statute as the Succession Duty Act they must be treated as having a situs which may be merely of a fictional nature. The decision of this Board in *Brassard* v. *Smith* (5) has been treated as laying down a correct test for ascertaining for fiscal purposes the situs of such shares. That was a claim by the collector of succession duty in the Province of Quebec in respect of certain bank shares, and it may be noted that the Treasurer for the Province of Nova Scotia had already recovered judgment for succession duty in respect of the same shares. In effect, therefore, it was a contest between the authorities of the two provinces, each of which could only levy " direct taxation within the province "in order to the raising of a revenue for provincial purposes ": British North America Act, 1867, s. 92, sub-s. 2. The shares were those of the Royal Bank of Canada, whose head office was at Montreal. The deceased died resident and domiciled in Nova Scotia, and intestate. The bank, however, had power by a Dominion statute to maintain in any province a registry office at which alone shares held by residents of that province could be registered and validly transferred. The Judicial Committee held that the ownership of the shares could only be effectively dealt with in Nova Scotia, and, therefore, were not property in Quebec for succession duty purposes, although the head office of the bank was at Montreal. In delivering the judgment of their Lordships, Lord Dunedin observed that the case was really settled by the decision in *Attorney-General* v. *Higgins* (1). After citing from the judgment of Martin B. in that case he continued (2): "It is quite true that in "that case the head office as well as the register was in "Scotland, but in their Lordships' view it is impossible to "hold that in that case the position of the head office was the "dominant factor merely on the strength of a phrase used by "the reporter of the Attorney-General's argument, and a "casual reference made to the case by Lord Esher in a "subsequent case of *Attorney-General* v. *Lord Sudeley* (3). In "the present case Duff J., dealing no doubt with the ' no "' local situation ' argument, said as follows : ' And the Chief "' Baron's judgment, I think, points to the essential element "' in determining situs in the case of intangible chattels for "' the purpose of probate jurisdiction as "the circumstance "' "that the subjects in question could be effectively dealt "' "with within the jurisdiction ".' This is, in their Lordships' "opinion, the true test. Where could the shares be effectively "dealt with ? The answer in the case of these shares is in "Nova Scotia only, and that answer solves the question." The claim on behalf of Quebec therefore failed.

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(1) [1941] O. R. 227.
(2) [1904] 1 Ch. 796.
(3) (1903) 1 Ir. R. 512.
(4) [1941] Ch. 462, 478–9.
(5) [1925] A. C. 371.

Some five years later *Erie Beach Co.* v. *Attorney-General for Ontario* (4) came before the Board. At first sight it strongly resembled the present case, for it related to shares in a company incorporated under the Ontario Companies Act, having its head office in that province. The deceased was one F. V. E. Bardol, and he was domiciled in the State of New York. He was the person chiefly concerned in the undertaking which was carried on at Fort Erie on the Canadian side. All the meetings of the company were held at Buffalo; its business was conducted from its office there; and all its books and records, including its records of share transfers, were kept there, regardless, apparently, of Canadian law. It is a fair inference that Mr. Bardol kept the certificates for the shares issued to him in Buffalo, but nothing is said in the report as to this. The claim on behalf of the Attorney-General of Ontario was for succession duty under s. 7 of the Act. The company had no legal transfer office in the State of New York. It had in fact passed a by-law, No. 22, in these terms: "Shares of stock in the company shall not be transferable "without the consent and approval of a quorum of the Board "of Directors. The shares of the company shall only be "transferable by the recording on the stock book of the "company at the head office of the company, or at the office "of the company's transfer agents, if any, by the shareholder "or his or her attorney, of the transfer thereof and the surrender "of the certificate of such share, if any certificate shall have "been issued in respect thereof, and upon the making of such "transfer in the books of the said company the transferee shall "be entitled to all the privileges and subject to all the liabilities "of the original shareholder, provided that the directors, in "case any certificate of share shall have been lost, may in "their discretion accept and cause to be recorded the said "transfer without the production of the original certificate." But no transfer agents in Buffalo were ever appointed, and Lord Merrivale, in delivering the judgment of the Board, after referring to certain sections of the Ontario Companies Act, had no difficulty in deciding that the shares in question, following the decision in *Brassard* v. *Smith* (1), could only be effectively dealt with in Ontario, and were, therefore, property situate there for the purposes of the Ontario Succession Duty Act. The maxim mobilia sequuntur personam was held to have no application in such case. It may be added parenthetically that the headnote in the Law Reports is not quite accurate, but it is difficult to see any ground of substance for criticizing the judgment delivered by Lord Merrivale. He cited the by-law and relied on it. McTague J.A. seems to have thought that the Board had some responsibility for the headnote, but that is not so. Their Lordships, however, quite agree with the learned judge that the *Erie Beach* case (1) is not an authority for holding that the provisions of the Ontario Companies Act altogether preclude a company subject to its provisions from legally establishing a transfer office in some place outside the province or inside it at some place other than at the head office.

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(1) 2 H. & N. 339.
(2) [1925] A. C. 376.
(3) [1896] 1 Q. B. 354.
(4) [1930] A. C. 161.

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(1) [1925] A. C. 371.

This is a question their Lordships have now to consider. They observe at this point that the two decisions of the Board, which have repeatedly been followed in Canada, relate to cases where there was a single province in which alone shares could be effectively dealt with, though, of course, the principle may have a limited operation in certain other cases. The legal position of the company as regards transfer offices and the registration of share transfers must depend mainly on the Ontario Companies Act and the by-laws of the company, for it is not suggested that there is anything in the letters patent incorporating the company which limits its common law powers in those respects. It should, however, be mentioned that the letters patent provide (inter alia) that the head office of the company is to be situate at the town of Haileybury in the Province of Ontario. In fact, the head office for some time past has been at Kirkland Lake. The letters patent also authorized the holding of meetings outside of the Province of Ontario.

[Having cited the relevant sections of the Ontario Companies Act, R.S.O., 1937, c. 251, his Lordship continued :] On December 21, 1916, the directors of the company passed a resolution appointing The Trusts and Guarantee Company, Ld., transfer agent and registrar of the capital stock of the company in the City of Toronto. On May 21, 1925, the directors of the company passed a resolution appointing the Royal Trust Company registrar of its stock in the City of Toronto. On May 18, 1927, the directors of Lake Shore Mines, Ld., passed the following resolution : "That the company hereby designate "and appoint Manufacturers & Traders Trust Company of "Buffalo, New York, as an additional registrar and transfer "agent at which office shareholders may have their stock "registered and transferred within the United States of "America." Their Lordships agree with all the judges in Canada that this resolution was within the powers of the directors, if the company had such a power. In 1914 the company had passed a by-law, No. 2, para. 17 of which related to transfers of stock. In was in the following terms: "17. A stock transfer book shall be provided in such form "as the board of directors may approve of and all transfers "of stock in the capital of the company shall be made in such "book and shall be signed by the transferor or by his attorney "duly appointed in writing. Stock certificates shall be in such "form as the board may approve of and shall be under the "seal of the company and shall be signed by the president or "vice-president and the secretary or such other officer in "place of the secretary as the board may by resolution "authorize." It is not in dispute that since the directors' resolution of May 18, 1927, American shareholders of the company have completed transfers of their shares through the Buffalo agency on books belonging to the company, and have had new certificates issued to and registered in the names of purchasers. Shares are transferable in either Buffalo or Toronto irrespective of where the certificates were issued. Careful steps are taken to prevent an over-issue of shares by daily reports being made by the officials of the company in Toronto and Buffalo as to the various transfers which are being effected day by day in the two cities respectively, and as to the issue of new certificates to new members.

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(1) [1930] A. C. 161.

It is contended by the appellant that, in the circumstances stated and in view of the Ontario Companies Act provisions, the company could not establish an agency office in the State of New York where transfers of its shares might be made in its books pursuant to ss. 56 and 60 of the Act. The point is not free from difficulty, and it has been elaborately argued. The contention on behalf of the appellant is mainly based on the view that the transfer books of the company, on which according to s. 56, sub-s. 1, the shares are transferable, must be included in the books mentioned in s. 101, in one of which books "must be recorded" the date and other particulars of all transfers of shares in their order, for all such books must (under s. 102) be kept at the head office of the company within Ontario. The Lieutenant-Governor in Council might have relieved the company from that provision if he thought fit, under s. 102, sub-s. 3, but he has not done so. There are some sections in the Act which at first sight seem to assist the appellant's contention, but, on the whole, their Lordships are satisfied that it cannot prevail. It is important to observe that the company could set up a transfer office out of Ontario unless there is in the Companies Act under which it was created an express declaration to the contrary: s. 217 of Act. Is there such a declaration? It is reasonably plain that the purpose of s. 101 is widely different from that of ss. 56 and 60. The first, like s. 107, is aimed at providing information to shareholders and creditors who are given a right of inspection under s. 105 "at the head office or chief place of carrying "on its undertaking." The objects of ss. 56 and 60 are mainly devoted to the rights of shareholders, and relate in particular to the regulations as to transfers of shares. Provided books are kept complying in all respects with s. 101 it is difficult to see why other books should not be kept elsewhere, outside of Ontario if so desired, in which shares shall be transferable as provided in s. 56. There is, at any rate, no express provision to the contrary, and it is significant in this connection that s. 102 is in terms confined to books mentioned in ss. 101 and 107, and does not include those mentioned in s. 56, or s. 60.

The conclusion on this point must, therefore, be in agreement with all the judges in Canada who have dealt with the matter, namely, that the company had legally established a transfer agency in Buffalo and that the shares in question at and before the death of the testator were transferable both in Ontario and in Buffalo. The answer, then, to the question where the shares could be effectively dealt with, must be, either in Ontario or in the State of New York, and further reasons must be found to justify a preference being given to one or the other. Fisher J.A. stated such reasons in his opinion (1): "As Williams had the physical control of the certificates of "these shares up to the time of his decease and as they were "registered in his name and thereby evidencing ownership "in him of property in the United States of America, and of "property which he could have sold and effectively transferred "at any time to a purchaser in the United States of America, "and also could have assigned or pledged as security in a "commercial transaction to an American citizen, the situs "of the shares was in the United States of America."

It will be convenient at this place to deal with the contention that the certificates are specialties on the ground that they are under the seal of the company, and that the shares were therefore situate in Buffalo. This was held to be the case by the judgment of Masten J.A. on the authority of two

(1) [1940] O. R. 419.

Irish cases (*In re Drogheda Steam Packet Co., Ld.* (1) ; *Smith* v. *Cork & Bandon Ry. Co.* (2)), and of *In re Artizans' Land & Mortgage Corporation* (3). These cases have not escaped criticism, as Masten J.A. himself observed, but whatever view may be taken as to their authority they do not justify the conclusion that a certificate for shares in a company is for general purposes a specialty. The word "specialty" is sometimes used to denote any contract under seal, but it is more often used in the sense of meaning a specialty debt, that is, an obligation under seal securing a debt, or a debt due from the Crown or under statute: see *Royal Trust Co.* v. *Attorney-General for Alberta* (4). Such an obligation was for centuries treated as very different from an ordinary debt. Indeed, the act of creating a specialty by deed was at one time possible only to men of the highest rank. Unlike debt, it was enforced by an action of covenant : Holdsworth, A History of English Law, 3rd ed., vol. iii., p. 417. The deed itself was the foundation of the action, the original debt, if any, being merged. The terms of the deed were conclusive. Specialty debts till recent times conferred special rights. They used to rank in the administration of the estate of a deceased person in priority to simple contract debts ; and, unlike such debts, were enforceable against the real estate. They were said to be "of a higher nature" than debts by contract. It is, therefore, not surprising that specialty debts by deed were treated from an early date as bona notabilia where the deeds were found at the time of the death, unlike ordinary debts which were said "to follow the person of debtor." That this is still the rule was decided in the House of Lords in the well-known case of *Commissioner of Stamps* v. *Hope* (5), where an interesting passage from Wentworth on the Office of Executors ((1763), pp. 45, 47, 60 (1.)) was referred to and followed: see also *Toronto General Trusts Corporation* v. *The King* (6). It may be useful to note that the situs of the specialty debt was originally one of considerable importance, because of the different prerogatives of the Archbishops of Canterbury and York. If there were assets in both provinces, there had to be several administrations, and administration in one was void as to the goods situate in the other : see Swinburne on Wills, 7th ed., vol. ii., p. 790 et seq. The rule as to situs had no meaning except in the cases where the specialty was an asset.

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(1) (1903) 1 Ir. R. 512.

(2) (1870) Ir. R. 5 Eq. 65.

(3) [1904] 1 Ch. 796.

(4) [1930] A. C. 144.

(5) [1891] A. C. 476.

(6) [1919] A. C. 679.

Their Lordships are concerned here merely with the question whether the certificates being under seal can be treated as establishing that the shares of the testator must be regarded as situate where the certificates were found at the death of the testator. They plainly are not specialty *debts*. They do not contain any express obligation or promise. As Lord Cairns observed in *Shropshire Union Railways & Canal Co.* v. *The Queen* (1), the certificate was not the title, but evidence of the title, to the shares: see also *Attorney-General* v. *Higgins* per Martin, B. (2). Being little more than pieces of paper evidencing the right to shares in the company it is impossible to regard them as taking the modern place of "notable goods." The ancient rules as to situs of specialty debts have no real application in such a case. It should be added that the view that ordinary certificates for shares are not specialty debts has been assumed to be correct in a number of decided cases both in Canada and in England and in a much greater number of cases where there has been no litigation. The rule laid down in *Brassard* v. *Smith* (3) would in practice be useless if the place where the certificates for shares were found at the time of the death should be taken to be necessarily the situs of the shares. Their Lordships have no hesitation in holding that the situs of the certificates is not, taken alone, sufficient to afford a solution to the present problem.

Before going further it is necessary to call attention to a circumstance which seems not to have been previously mentioned. Their Lordships noted that the only stock certificates proved in evidence of which complete copies were produced were two in number (exhibits 10 and 14), the first relating to 1000 shares in the name of A. D. Williams, and the second to 100 shares in his name. Each bears the usual endorsement on the back of forms of transfer of the shares and the appointment of an attorney for the purpose. The endorsements are signed, one of them "Alexander Duncan "Williams," and the other "A. D. Williams." The names of the transferees and of the attorneys are left in blank. These exhibits were put in at the trial by Stephen Albert Smyth, the manager of the Stock Transfer Department of the Trusts and Guarantee Company in Toronto. The exhibit

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(1) (1875) L. R. 7 H. L. 496, 509.

(2) 2 H. & N. 339.

(3) [1925] A. C. 371.

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17A, which consisted of the original stock certificates of the company in the name of A. D. Williams, or Alexander Duncan Williams, for the whole 10,200 shares, was filed by consent of the parties on November 4, 1940, as though put in at the trial, and they were admitted by the appellant to be identical with one or other of the exhibits 10 and 14. Counsel for the appellant before their Lordships admitted that it must be taken in the circumstances that the testator had signed the endorsements on all the certificates in his name leaving the names of the transferees and of the attorneys in blank in the way usual both in the Dominion and in the United States. This had the admitted result of making a delivery of the certificates with the endorsements signed in blank a good assignment of the shares, since it passed a title to the assignees both legal and equitable, with a right as against the company to obtain registration and to obtain new certificates: *Colonial Bank* v. *Cady and Williams* (1). It must be accepted, therefore, as a fact, that the certificates were currently marketable in the State of New York as securities for the shares, and that they were documents necessary for vouching the title of the testator to the shares. This conclusion of mixed law and fact has been followed in Canada in *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (2). That was a case of conflicting claims to jurisdiction between the Canadian Custodian of Alien Enemy Property and the Alien Property Custodian of the United States. The decision of the Supreme Court depended on special circumstances, but incidentally it was held, and it was not here in dispute, that the lawful holder in the United States of certificates for shares endorsed and signed in blank by the holder is entitled both under Canadian and United States law to have himself or his nominee registered as the owner thereof.

There remains the question whether, accepting the view, first, that there were two places in which the shares could properly be registered (of which one was outside Ontario) and, secondly, that the certificates are not of the nature of specialties, the shares must be regarded as "property situate "in Ontario" at the date of the death. It may be useful here to make some general remarks on the meaning and effect of the principle laid down in *Brassard* v. *Smith* (3) and in the

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(1) 15 App. Cas. 267.

(2) [1931] S. C. R. (Can.) 170.

(3) [1925] A. C. 371.

Erie Beach case (1). The first observation is that the phrase used in laying down the principle clearly means "where the "shares can be effectively dealt with as between the shareholder "and the company, so that the transferee will become legally "entitled to all the rights of a member," e.g., the right of attending meetings and voting and of receiving dividends. If the phrase only meant "effectively dealt with as between "transferor and transferee of shares," the test would obviously be almost completely useless, since the rights of a shareholder as between himself and a transferee can, speaking generally, effectively be transferred in any part of the world. The second observation is that the test, where applicable, is concerned merely with the place where the shares are to be taken to be situate. The late owner in the normal case was absolutely entitled to the shares as the registered owner of them in the books of the company, and, if resident in a country or province different from that in which the shares can be effectively dealt with, could nevertheless have sold the shares and completed the transaction by an attorney or otherwise. That, however, does not touch the question of situs. Moreover, in relation to succession duties imposed by the provinces of Canada, some other propositions are well-founded. *Rex* v. *National Trust Co.* (2), a decision of the Supreme Court, related to a claim by the Crown in the right of the Province of Quebec to succession duties alleged to be due on the death of Sir Clifford Sifton in respect of bonds or debentures of two Dominion companies, the Grand Trunk Pacific Railway Company and the Canadian National Railway Company, guaranteed by the Government of Canada. Sir Clifford was domiciled in Ontario and died in Toronto, where the bonds or debentures were in his possession. The two companies had their head offices in Montreal, and the bonds or debentures were registered there where alone the bonds were transferable, and they were in neither case transferable by delivery. Succession duty had been paid to the government of the Province of Ontario. In Quebec, the duties were claimed under ss. 3 and 5 of the Quebec Succession Duties Act, and it had to be established that the bonds or debentures were "situate within the province" at the time of death. In what their Lordships take leave to describe as a very luminous judgment of the Supreme Court Chief Justice Duff formulated as the result of the authorities certain propositions pertinent

(1) [1930] A. C. 161.

(2) [1933] S. C. R. (Can.) 670.

to the question of situs of property with which their Lordships agree. First, property, whether movable or immovable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation. Secondly, situs in respect of intangible property must be determined by reference to some principle or coherent system of principles, and the courts appear to have acted on the assumption that the legislature in defining in part at all events by reference to the local situation of such property the authority of the province in relation to taxation, must be supposed to have had in view the principles deducible from the common law. Thirdly, a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property for the purpose of defining the subjects in respect of which its powers of taxation under s. 92, sub-s. 2, of the British North America Act may be put into effect.

Their Lordships are now in a position to deal with the problem arising from the existence of two valid registries, one in Ontario and one in Buffalo. They observe that the solution must be the same in this case as it would have been if the testator had been domiciled in another province of Canada, say in Quebec, instead of in New York, and if all the other facts had been as they were in fact, including the existence of a separate registry in Quebec. It has been argued that in a case where shares can be effectively dealt with in registries existing in different fiscal areas, a possible view is that the case of *Brassard* v. *Smith* (1) and following decisions, above referred to, have no application, and that a completely different test or tests of situs should be applied, e.g., that of head office or principal place of business, or domicile, leaving out of account the principle laid down in *Brassard* v. *Smith* (1). Their Lordships do not accept this view. The principle seems to them not to have lost all weight even if in certain cases a choice has to be made as between more than one place where the shares can effectively be transferred. Moreover, to search through all the surrounding circumstances for a completely new ground for attributing a situs to the shares would certainly not be keeping within the " coherent system of principles " by which the courts ought to be guided in such a case. One or other of the two possible places where the shares can be

(1) [1925] A. C. 371.

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effectively transferred must therefore be selected on a rational ground.

Their Lordships have come to the conclusion that the existence in Buffalo at the date of the death of certificates in the name of the testator endorsed by him in blank must be decisive in the present case. They must reject the notion that the domicile of the deceased has anything to do with the situs of the property, or that the maxim "mobilia sequuntur "personam" has any relevance. Some observations on this head contained in the judgment of the Board, delivered by Lord Thankerton, in *Provincial Treasurer of Alberta* v. *Kerr* (1) may be usefully referred to. As was long ago remarked, the owner in any country may dispose of his personal property in any other country, yet on his death the maxim is applicable. The certificates endorsed and signed as they were cannot be regarded as mere evidence of title. They were valuable documents situate in Buffalo and marketable there, and a transferee was capable of being registered as holder there without leaving the State of New York or performing any act in Ontario. On the testator's death his legal personal representatives in the State of New York became the lawful holders of the certificates, entitled to deal with them there. Any sale by them would be " in order," and the purchaser could obtain registration in the Buffalo registry. If we contrast the position in Ontario the difference is obvious. Nothing effective could lawfully be done there without producing the certificates, and the legal personal representatives in Buffalo could not be compelled to part with them to enable the transfers to be effected in Ontario rather than at Buffalo. In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario.

Their Lordships do not think it would be right for them to express any opinion as to the conclusion which they would have come to if the certificates had not been endorsed and signed in blank by the testator, for that point does not arise for decision, and there are some obvious distinctions arising in cases where the endorsement on certificates has not been signed by the registered holder. Further, they have avoided any citations from the recent decision of the Court of Appeal for Ontario in the case of *The Treasurer of Ontario* v. *Blonde* (2), for the reason that they were informed that an appeal to His

(1) [1933] A. C. 710, 721.

(2) [1941] O. R. 227.

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Majesty in Council in that case is pending, and it seemed better not in any way to prejudice the appeal.

On the above grounds their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lee & Pembertons.*

[HOUSE OF LORDS.]

H. L. (E.)*
1942
Feb. 16, 17, 19, 23; *Apr.* 27.

McMILLAN . . . . APPELLANT;

AND

GUEST . . . . RESPONDENT.

Revenue—Income tax—Public office—Director of company—Residence abroad—No duties performed in England—Voluntary work for the company abroad—Assessability—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch.* E; *Rules applicable to sch. E, r.* 6 (*h*).

The director of an English company, whether public or private, which is resident in the United Kingdom, wherever he resides and whether or not he takes any part in directing the affairs of the company, holds a "public office within the United Kingdom" and is liable to be charged to income tax in respect of the profits of his office under sch. E to the Income Tax Act, 1918.

Pickles v. *Foster* [1913] 1 K. B. 174, and dictum of Rowlatt J. in *Proctor* v. *Ryall* (1928) 14 Tax Cas. 204, 214, dissented from.

Decision of the Court of Appeal [1941] 1 K. B. 258 affirmed.

APPEAL from the Court of Appeal.

The facts, stated by Lord Porter, were as follows: The appellant was a director of A. Wander, Ld., a private company which was resident and controlled in the United Kingdom. He was appointed a director by the articles of association and had no contract of service with the company. By art. 90 the remuneration of the directors was a sum equal to ten (originally fifteen) per cent. of the net profits of the company in every year, and was divisible among the directors in such proportion as they might agree, and, in default of agreement, equally. Since 1919 the appellant had been resident in the United States of America, and in 1938 he became a naturalized

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* *Present:* LORD ATKIN, LORD WRIGHT, LORD ROCHE, and LORD PORTER.

American citizen. He went to America to take over the management of a company in Chicago allied to the predecessors of A. Wander, Ld., for whom he opened a Canadian office, and concerned himself in the administrative and selling organization there. In 1930, largely as a result of his advice, a Canadian factory was built. The appellant superintended its building and afterwards continued to advise its manager on matters relating to the conduct of the business. The appellant, as managing director of the Chicago company, consulted with the managing director of the English company or any other director of the latter company when they were in Chicago regarding anything to the advantage of the English, Chicago or Canadian businesses, and had assisted in Canada in engaging the Canadian staff. Copies of all minutes, annual balance sheets and managing directors' and auditors' reports of A. Wander, Ld., were sent regularly to the appellant in America, but he attended no board meetings in England except one in 1931, and only one in Chicago in 1925. He was not required to attend board meetings of the English company, and notices of such meetings were not sent to him. He was assessed by the General Commissioners of Income Tax in respect of his income as director of the English company under sch. E to the Income Tax Act, 1918, for the years 1937–38 and 1938–39, but, being dissatisfied with the decision in point of law, required a case to be stated. The case was heard first by Lawrence J., who overruled the commissioners, and afterwards by the Court of Appeal who restored their assessment. The appellant appealed to the House of Lords.

Tucker K.C. and *Donovan* for the appellant. On the charging words of sch. E tax is only payable under it on remuneration derived from an office or employment which is situate within the United Kingdom. The appellant's office was not " within the United Kingdom " within the meaning of r. 6 of the Rules applicable to sch. E, for the situation of any office or employment for the purposes of sch. E is the place where the duties of the office are to be performed or where the office is exercised: *Proctor* v. *Ryall*, per Rowlatt J. (1). [They also referred to *Pickles* v. *Foster* (2) ; *Barson* v. *Airey* (3) ; *Robinson* v. *Corry* (4).] In the present case, the place of the

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(1) (1928) 14 Tax Cas. 204, 214.
(2) [1913] 1 K. B. 174.
(3) (1926) 10 Tax Cas. 609, 635.
(4) [1934] 1 K. B. 240.

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exercise of the office was abroad. The special provision in r. 18, sub-r. 2, of the rules supports the view that, save in cases to which it applies, a person exercising his office abroad is not liable to tax. It is a mistake to take a narrow view of directors as persons who only attend board meetings. Where, as here, the company's business is partly within the United Kingdom and partly abroad and the duties of a director managing the business abroad are wholly performed abroad, they cannot be treated as exercised here. Further, the director of a private company does not hold a "public "office" within r. 6. [They referred to *Bowers* v. *Harding* (1); *Langston* v. *Glasson* (2); *Watson* v. *Rowles* (3); *Great Western Ry. Co.* v. *Bater* (4).]

Sir Donald Somervell A.-G. and *R. P. Hills* for the respondent. The salary received by the appellant was derived from a public office or employment within the United Kingdom within r. 6. If he held an office there, it was not necessary that he should exercise it there. The source of his income was in the United Kingdom. The company was controlled and managed here, and therefore the appellant is taxable: *Bennett* v. *Marshall* (5). A director has a title and function in the company's permanent structure, and the duties of a director of a company which has its seat and management in the United Kingdom are exercisable properly speaking only there. A director holds a public office since incorporation of a company is a statutory privilege obtained under a public Act of Parliament. The director of a private company is, for this purpose, in the same position as the director of a public company.

Tucker K.C. replied.

The House took time for consideration.

1942. April 27. LORD ATKIN. My Lords, this is an appeal from an order of the Court of Appeal reversing a decision of Lawrence J. who allowed an appeal by the appellant from a determination of Commissioners for the General Purposes of Income Tax upholding an assessment of the appellant for income tax under sch. E. The sole question is whether the appellant, who in the years of assessment was a director of a limited company, A. Wander, Ld., had held a public office of profit within the United Kingdom. The facts are not in dispute.

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(1) [1891] 1 Q. B. 560.
(2) [1891] 1 Q. B. 567.
(3) (1926) 95 L. J. (K. B.) 959; 11 Tax Cas. 171.
(4) [1920] 3 K. B. 266.
(5) [1938] 1 K. B. 591.

Schedule E to the Income Tax Act, 1918, provides that "tax under sch. E shall be charged in respect of every public "office or employment of profit." By r. 6: "The tax shall be "paid in respect of all public offices and employments of "profit within the United Kingdom . . . . viz. . . . . (*h*) "offices or employments of profit under any company or "society whether corporate or not corporate." It is necessary to consider whether the appellant (1.) held an office; (2.) held a public office; (3.) held a public office within the United Kingdom.

(1.) On the first point there was no dispute. There is no statutory definition of "office." Without adopting the sentence as a complete definition one may treat the following expression of Rowlatt J. in *Great Western Ry. Co.* v. *Bater* (1), adopted by Lord Atkinson (2), as a generally sufficient statement of the meaning of the word: "an office or employment "which was a subsisting, permanent, substantive position "which had an existence independent of the person who filled "it, which went on and was filled in succession by successive "holders." There can be no doubt that the director of a company holds such an office as is described.

(2.) It was contended by the appellant that, while he held an office, yet it was not a public office within the meaning of the Income Tax Act, 1918. It can hardly be said to be obvious that the position of director of a trading company which may carry on business with a very small capital on a very small scale is necessarily a public office, but it is impossible to give effect to the words of r. 6 (*h*) "any "company" so as to distinguish between those whose offices are public and those whose offices are not. In particular, in reference to companies incorporated under the Companies Acts it has to be remembered that the legislature has thought fit to impose duties on their officers which attach to them as such and are not imposed on private partnerships as, for instance, s. 27, sub-s. 2; ss. 37, 112, 122, 217 of the Companies Act, 1929. I can find no reason for distinguishing in this respect between offices held in a private company within the meaning of the Companies Acts (which this is)

(1) [1920] 3 K. B. 266, 274.

(2) [1922] 2 A. C. 1, 15.

and a public company. Some of the above sections, though not all, apply to both. The office of director of this company was for the above reasons a "public office."

(3.) Was, then, the office held by the appellant a public office "within the United Kingdom"? As to this I am completely satisfied by the reasoning of the Master of the Rolls in his judgment delivered in the Court of Appeal. I will only add that we are here dealing with an "office," not with an "employment," the locality of which may be governed by different considerations. The office of director of an English company, the head seat and directing power of which is admitted to be in the United Kingdom, seems to me of necessity to be located where the company is. It is, in fact, part of the organic structure of the corporation. In such a case I do not think that it is true, as suggested by Rowlatt J. in *Proctor* v. *Ryall* (1), that "the place of exercise governs." The appellant, though resident in the United States of America, while there held office in the United Kingdom, and, though he may have taken his share of the directing power only in attending to the activities of the English company in the United States of America and in Canada, he did so by virtue of his English office. From this point of view I think that too much emphasis may be laid on the source from which the office was remunerated, but the fact that it was English reinforces the view that the locality of the office was in fact English. Like the Master of the Rolls, I derive little assistance from previous cases. I consider it to be clear that the director of an English company which is resident in the United Kingdom, wherever he resides and whether or not he takes any part in directing the affairs of the company, holds an office in the United Kingdom.

For these reasons I am of opinion that the appeal fails and should be dismissed with costs.

My noble and learned friend, Lord Roche, wishes me to state that he concurs in the order proposed.

Lord Wright. My Lords, the appellant was not resident in this country during the years of charge. Accordingly, the emoluments derived from his directorship in A. Wander, Ld., are not taxable unless they fall within the words of sch. E, nor are they affected by the provisions of s. 18 of the Finance Act, 1922, because they could not have been charged under

(1) 14 Tax Cas. 204, 214.

sch. D. The Crown has, therefore, to establish that they are profits of a public office or employment within the United Kingdom, which last condition is specified in r. 6.

As r. 6 (*h*) expressly includes offices or employments of profit under a corporate company, and as A. Wander, Ld., is a company registered in England under the Companies Acts, the requirements of sch. E would seem so far to be satisfied. The company, further, is one which, as the case finds, is resident and controlled in the United Kingdom. I limit my observations to such a company without considering what is the position of a company registered in the United Kingdom but controlled and managed abroad. The next matter to be examined is whether the directorship held by the appellant is an office or employment within the meaning of sch. E. The word " office " is of indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following: " A position or place to which certain duties are "attached, especially one of a more or less public character." This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular, *Great Western Ry. Co.* v. *Bater* (1), where the legal construction of these words, which had been in sch. E since 1803 (43 Geo. 3, c. 122, s. 175), was discussed. It was there held that the position of a clerk in a railway company was not an office or employment of profit of a public nature within sch. E. Lord Wrenbury was content so to hold without attempting to define what type of office or employment would satisfy the language of the schedule (2). Lord Sumner (3) said that to hold otherwise would be " an abuse "of language." To hold that the director of a company such as A. Wander, Ld. (though it is what is called a private company), does not have an office within the meaning of the schedule would equally, in my opinion, be an abuse of language. Everyone, I think, would say that as director he held an office in the company. The word " employment," in my opinion, has to be construed with and takes its colour from the word "office."

If I may adopt the words of the Master of the Rolls, it is too late to say that the director of a company like this does not hold an office within sch. E. I do not attempt what their

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(1) [1922] 2 A C. 1.

(2) Ibid. 35.

(3) Ibid. 25.

Lordships did not attempt in *Bater's* case (1), that is, an exact definition of these words. They are deliberately, I imagine, left vague. Though their true construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense with due regard to the requirement that there must be some degree of permanence and publicity in the office. In *Bater's* case (2), Lord Wrenbury seemed to disapprove of the opinion of Bankes J. in *Berry* v. *Farrow* (3), that a director held an office within the schedule, but I cannot think that his disapproval was justified or has been supported. In *Watson* v. *Rowles* (4), a director of a "private" limited company was held to be taxable under sch. E. The public character of the company is sufficiently established by its being incorporated under the statutory machinery of the Companies Acts and by its being subject to the provisions of these Acts. It is, however, clear that not all officers, and still less all employees, of a limited company or of any corporate body are holders of an office or employment under sch. E. This is illustrated by *Bater's* case (1), and much earlier by *Attorney-General* v. *Lancashire and Yorkshire Ry. Co.* (5). I do not think that the agency considered in *Pickles* v. *Foster* (6) was correctly treated as an office or employment within sch. E.

There still remains the question whether the appellant's office or employment, though it is public, is one within the United Kingdom as required by r. 6 of sch. E. The commissioners held that it was, because the appellant retained the right and duty to exercise the power of a director. That decision was reversed by Lawrence J. on the ground that the place of exercise governed. For that principle he relied on *Pickles* v. *Foster* (6), and on the dictum of Rowlatt J. in *Proctor* v. *Ryall* (7). That dictum, however, was not necessary to the decision of the case and is qualified in its scope. For instance, Rowlatt J. refers to the case of a sinecure which is not exercised anywhere at all. I do not think that Rowlatt J. was right if or so far as he held that the place of exercise governed. The office of a director is something notional. Its locality is one degree, if that is possible, even more notional. In my opinion, the place where it is exercised, if it is exercised anywhere at all, is not necessarily the test. As obvious illustrations, I may refer to heads (*d*), (*e*), (*f*), under which come officers in the Armed Forces of the Crown. To them r. 18, sub-r. 2, of the schedule clearly applies, at least as machinery for the assessment which is to be at the head office of the department, but, in any case, the words of r. 1 are not simply "exercising," but "having or exercising," the office or employment. Exercising, no doubt, does involve activity in the office or employment, but a man may have an office and draw the emoluments without doing any work at all. For instance, a director may in certain cases be properly allowed to retain his emoluments when for good reasons he may be relieved from any active duties at all. I have already mentioned the case of a sinecure. The peculiarity of this case is that the appellant has all the time been rendering in the United States and in Canada services of great value to the company, while at the same time he has been released from and has not performed the normal duties of a director, such as attending at board meetings, but he has still remained a director, and as such cannot be in a different position from what he would have been in if he had not rendered those services abroad. I agree with the Master of the Rolls that it is in the office of director that the crucial test is to be found, because "every right which a director has and every duty "which the law, general or special, imposes on him is to be "exercised in this country and nowhere else." That is the test accepted in substance by the commissioners. It is, I think, the true test in a case like this. The appellant had or held all through the years of charge the office of director in the United Kingdom. That, in my opinion, is sufficient to satisfy the schedule. The cases cited do not afford any strict parallel. In *Robinson* v. *Corry* (1), the taxpayer, who was deputy cashier at the naval base at Singapore, was not only outside the United Kingdom during the period of charge, but exercised all the duties of the employment there, as its nature required. The Master of the Rolls, I think correctly, treats the liability of the taxpayer there as depending on r. 18, sub-r. 2, which relates to employment under government. *Pickles* v. *Foster* (2) could be sufficiently decided against the Crown on the ground that the agency in West Africa was not an office or employment within sch. E. The ruling that the office or employment to come within sch. E must be exercised in the United Kingdom was not necessary to the decision and cannot, I think, be supported. I think that the appeal should be dismissed.

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(1) [1922] 2 A. C. 1.
(2) Ibid. 34.
(3) [1914] 1 K. B. 632.
(4) 95 L. J. (K. B.) 959.
(5) (1864) 2 H. & C. 792.
(6) [1913] 1 K. B. 174.
(7) 14 Tax Cas. 204.

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(1) [1934] 1 K. B. 240.

(2) [1913] 1 K. B. 174.

Lord Porter. My Lords, I agree that this appeal should be dismissed. The points taken on behalf of the appellant were two in number: (1.) That his office was not within the United Kingdom; and (2.) that it was not public. For the first point reliance was placed on the decisions in *Pickles* v. *Foster* (1) and *Proctor* v. *Ryall* (2). The result of those cases was said to be that an office was not within the United Kingdom unless it was exercised there, and the appellant went on to argue that on the facts found he did not exercise his office in this country. The Crown did not dispute, and, indeed, I think it is plain under the rules applicable to sch. E, that tax is charged only on persons having or exercising an office mentioned in the schedule, and the only offices mentioned in the schedule are those within the United Kingdom. If, therefore, the office is not within the United Kingdom it is not the subject of tax under this schedule. But though they made this admission, the Crown did not accept the view that the office must be exercised within the United Kingdom. Whether a person, who holds the office of director in a company resident and managed and, therefore, controlled in this country, who receives his fees from a pool provided in this country for himself and his co-directors—a pool divided up in the proportions which they agree—and who receives copies of minutes, annual balance sheets and managing directors' and auditors' reports, exercises or does not exercise his office in this country is a question which I do not think it necessary to decide. In the two cases quoted the problem was expressed with sufficient accuracy by asking whether the employment was exercised here or not. No question of *having an office* arose, but it does arise in the present case, and, whatever views one may entertain as to the accuracy of the language used in the cases referred to when applied to those individual cases, it is not, I think, intended to apply to all cases under sch. E. For the present purpose it is enough to say that a person in the position of the appellant holds an office in this Kingdom despite the fact that he has not in fact attended any meetings in this country since 1931. He is a director of a company resident and managed in this country,

(1) [1913] 1 K. B. 174.

(2) 14 Tax Cas. 204.

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entitled to attend any board meetings which may be held here, giving advice as to matters concerning its management, and supplied at least with its formal literature. In such a case it is, I think, immaterial that most, if not all, of the appellant's activities are carried out in America. He still holds an office in the United Kingdom.

If the appellant is, as I think he is, wrong on this point, he still has a second string to his bow. Even, he says, if he has or exercises an office in the United Kingdom, it yet is not a public one. That it is an office is, I think, plain. It has permanency apart from the temporary holder and is held in one of the specified corporations. One has only to refer to sections such as ss. 145 and 151 of the Companies Act, 1929, to find the phrase " office of director " expressly mentioned. Indeed, this is not in dispute. What is controverted is the allegation that a directorship, at any rate in a so-called private company, is a public office. The argument is put on the ground that at worst—i.e., at worst for the appellant—directors of companies not by statute requiring any directors, if appointed at all (as they may be, but are not compelled to be, in the case of a private company), are not holders of a public office. There is no magic in the phrase " private "company." It is true that it need not have directors or issue a prospectus, and that it is not permitted to have more than fifty shareholders and may have no more than two, but it still must be registered and keep an official register of its members. It is a corporate body constituted by Act of Parliament (now the Companies Act, 1929), and that Act imposes duties on the office itself and its holder for the time being. These obligations are imposed in the public interest that some public control over its organization and activities may be obtained. No doubt, less control is exercised in the case of a private than in the case of a public company, but the former is not private in the sense that it has no public formalities to carry out, and the word " private " is only used as a convenient label to distinguish it from the so-called " public " company. I think the office is a public one, and I agree with the motion proposed from the woolsack.

Appeal dismissed.

Solicitors for appellant: *Goulden, Mesquita & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

SKELTON AND OTHERS . . . . APPELLANTS;

AND

YOUNGHOUSE AND ANOTHER . . . . RESPONDENTS.

H. L. (E.)*

1942

Mar. 5, 6;
Apr. 27.

Will—Construction—Option to purchase shares in private company—Subsequent death of donee without exercising option—Exercise by assignees or executors of donee.

There is no rule of law that an option given by will to a named person is prima facie personal to the donee only, and the statement to that effect in Jarman on Wills, 7th ed., at p. 73, is incorrect.

The question whether such an option to purchase is exercisable only by the donee personally or is transmissible to his executors or assignees depends on the true construction of the will in the light of any circumstances properly admissible in evidence:—

Held, that, on the true construction of a testator's will, an option to purchase shares belonging to his estate at par value was personal to the donee, and could not be assigned by him or be exercised by his executors after his death.

Judgments of Cotton and Lindley L.JJ. in *In re Cousins* (1885) 30 Ch. D. 203 approved and distinguished. *In re Madge* [1928] W. N. 71; 44 T. L. R. 372 approved.

Decision of the Court of Appeal (sub nom. *In re Sykes. Younghouse* v. *Sykes*) [1941] Ch. 1 affirmed.

APPEAL from the Court of Appeal.

The facts, as stated by VISCOUNT MAUGHAM, were as follows: At the date of his will the testator, William Shaw Sykes, owned certain shares in a private company called "the English "Card Clothing Company, Ld." Three hundred of those shares at that date were standing in the books of the company in the name of the testator's son, Edward, as the nominee of the testator. They were of the nominal value of 10*l.* a share. The testator made his will on February 15, 1911, and thereby gave all his real and personal estate to his wife, Clara, and his sons, Edward Musgrave Sykes (hereinafter called "Edward") and Leonard Musgrave Sykes (hereinafter called "Leonard"), on trust for sale and conversion with the fullest discretion to postpone the sale and conversion, and on trust to invest the ultimate proceeds of conversion and to pay the income of the trust moneys and investments to his wife

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* *Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, and LORD PORTER.

Clara for her life, and he declared that after her death his trustees should stand possessed of the trust premises upon trust for his sons, Edward and Leonard, in equal shares. Both Edward and Leonard survived the life tenant. The will continued as follows: "And whereas part of my estate "consists of the shares in the English Card Clothing Company, "Ld., now standing in the name of my son Edward Musgrave "Sykes as registered owner and I am desirous that my said son "shall have the opportunity of becoming absolute owner of "the same shares. Now I hereby declare and direct that "upon the decease of my said wife or previously thereto in "case or whenever my trustees shall proceed to realize the "part of my estate consisting of or including such shares and "my beneficial right thereto and ownership thereof my son "Edward Musgrave Sykes shall have the option of purchasing "and becoming absolute owner of the said shares or any part "thereof and all my estate interest right and title therein and "thereto the value of such shares for the above purpose to be "estimated at par value." The testator died on September 9, 1916, and the widow and the son, Edward, shortly afterwards proved the will. The 300 shares of 10*l.* each in the company, which belonged to the testator were still registered at the time of his death in the name of the son, Edward. They were subsequently subdivided into 3000 shares of 1*l.* each. By a deed dated July 26, 1932, Edward purported to assign the benefit of the option to trustees. The trustees of the will did not realize the shares during the widow's lifetime. She died on May 18, 1939, and Edward thereupon became entitled to exercise the option given to him by the will, that is, to purchase the beneficial interest in the 3000 shares at par value. They were then of the value of 2*l.* 6*s.* a share or thereabouts. He, however, died on June 29, 1939, without having exercised the option, and the question arose whether it was now exercisable by his executors. It appeared from the memorandum of association and the articles, that the company had been formed in 1897 to amalgamate four card clothing concerns, one of which belonged to the Sykes family. In February, 1916, new articles were adopted, the company having by that time become a private company in the strict technical sense, with restrictions on transfer of the usual character, giving the directors a right to require any intending transferor of shares to offer the shares to them at the market price, to be fixed annually by the auditors. The shares at the date of the will were of a value considerably in excess of their nominal value. The option, therefore, at the date of the will as well as at the date of the testator's death was of a considerable pecuniary value.

Bennett J. held (1) on an originating summons, in which the respondent Arnold Chadwick Younghouse, one of the trustees of the will of the testator, was plaintiff and the testator's son Leonard (since deceased) and the executors of his son Edward were defendants, that, in the events that happened, the option ceased to be exercisable on the death of Edward. He based his decision on a statement to be found in the 7th ed. of Jarman on Wills, vol. i., p. 73, that "an "option of purchase given by will to A. B. is prima facie "personal to him and does not pass to his executors on his "death." The decision of the Court of Appeal in *In re Cousins* (2), was cited in support of that statement, and Bennett J. held that that decision did in fact support it. An appeal by the appellants was dismissed by the Court of Appeal (3). All the lords justices agreed that *In re Cousins* (2) did not lay down any principle of construction but turned on its own peculiar facts. Scott and Clauson L.JJ. held on the construction that the option was given to Edward personally, and was, therefore, not assignable or transmissible. Luxmoore L.J., who dissented, expressed the opinion (4) that the judgment of the Privy Council delivered by Lord Dunedin in *Wright* v. *Morgan* (5) laid down a general principle of construction that there was nothing in the nature of an option of purchase conferred by a will on a named person which in the absence of a context pointed to non-assignability. The lord justice said that in his view there was nothing in this testator's will which pointed to non-assignability, and he held that the fact that the subject-matter of the option was a beneficial interest in shares in the company and that this conferred and was intended to confer a large pecuniary benefit on the son, together with other circumstances, showed that the testator contemplated that the option was assignable. The executors of Edward appealed to the House of Lords.

Roxburgh K.C. and *S. P. Hayward* (for *T. Burgess*, on war service) for the appellants. In such a case as this the court

(1) [1940] Ch. 490.
(2) (1885) 30 Ch. D. 203.
(3) [1941] Ch. 1.
(4) Ibid. 15.
(5) [1926] A. C. 788.

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must look at the nature of the subject-matter of the gift and the condition to be fulfilled by the person to whom the option is given. If, for example, the condition imposed were marriage to a particular person, it could not obviously be performed by executors. Where, however, the fulfilment of the condition imports no personal qualifications, but only depends on payment of a sum of money the condition can prima facie be performed by executors, and the presumption is in favour of the transmissibility of the right to exercise an option. There is no reason why this presumption should not operate in the case of an option given by will. *Wright* v. *Morgan* (1) is substantially indistinguishable from the present case. The statement in Jarman on Wills, 7th ed., p. 73, that "an option of purchase given by will to A. B. is prima facie "personal to him, and does not pass to his executors on his "death" is incorrect and *In re Cousins* (2) gives no authority for it. [They also referred to *In re Goodwin* (3); *Buckland* v. *Papillon* (4); *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (5); *Belshaw* v. *Rollins* (6); and *In re Madge* (7).]

Vaisey K.C., *Winterbotham* and *William Cook* for the respondents. The appellants are seeking to add something to the words from which Edward derived benefit, whereas this is a gift and must be taken as it is given. The thing dealt with is not an estate, but rather an act of volition, and the appellants claim that the act may be that of some persons other than Edward. *Wright* v. *Morgan* (1) is not conclusive of the present case and the observations relied on by the appellants were obiter. *Belshaw* v. *Rollins* (6) is a different case because it was a gift of property and not of a mere option. If the appellants were to succeed it would be necessary to overrule *In re Cousins* (2). [They referred to *In re Baron Wavertree of Delamere* (8); *In re Wilson* (9); *Radnor* (*Earl*) v. *Shafto* (10); and *In re Goodwin* (3).]

Roxburgh K.C. replied.

The House took time for consideration.

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(1) [1926] A. C. 788, 795, 796.

(2) 30 Ch. D. 203, 205, 210.

(3) [1924] 2 Ch. 26.

(4) (1866) L. R. 1 Eq. 477; L. R. 2 Ch. 67.

(5) [1903] A. C. 414, 423.

(6) [1904] 1 I. R. 284, 286.

(7) [1928] W. N. 71; 44 T. L. R. 372.

(8) [1933] Ch. 837.

(9) [1908] 1 Ch. 839.

(10) (1805) 11 Ves. 448.

1942. April 27. VISCOUNT MAUGHAM. This is an appeal from the order of the Court of Appeal (Scott, Clauson and Luxmoore L.JJ.) dated September 19, 1940, affirming the order of Bennett J. in an action commenced by originating summons in which the respondent, Arnold Chadwick Younghouse, was the plaintiff and Leonard Musgrave Sykes (since deceased) and the appellants were the defendants. The question raised is whether an option to purchase shares in a private company conferred by the will of William Shaw Sykes on his son, Edward Musgrave Sykes, was exercisable by the son's executors or assignees after his death.

My Lords, I cannot think that there is any sufficient ground for holding that an option of purchase given to A. B., created by the will of a testator and relative to a part of his property, is prima facie personal to A. B. I agree with the view of the Court of Appeal that *In re Cousins* (1) cannot be treated as laying down such a principle, and I think that case depended, as a careful consideration of the judgments of Cotton and Lindley L.JJ. seems to show, on the language used by the testator in the light of the surrounding and somewhat special circumstances of that case. Nor do I think that Lord Dunedin intended in *Wright* v. *Morgan* (2) to lay down any general rule which would apply in such a case as your Lordships have before you. The case related to a right of pre-emption in relation to an estate devised by the will of the testator. The passage relied on is a very short one (3): "The leading question "accordingly is whether the option to purchase given by the "will to Harry Herbert was assignable and assigned to "Douglas. . . . . Speaking generally, any vested interest is "assignable unless there is something in the nature of the "interest, or something in the words of the settlement which "creates the interest which contradicts the nature of assign-"ability." If I correctly understand the words "vested "interest," which generally implies in English law that the interest given is not subject to any condition, I see nothing to criticize in this general statement, but it is to be noted that the right given in the present case was not a vested interest in the ordinary sense and that the words "unless there is some-"thing in the nature of the interest or something in the words "of the settlement which creates the interest which contradicts "the nature of assignability," qualify the general proposition.

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(1) 30 Ch. D. 203.

(2) [1926] A. C. 788.

(3) Ibid. 795, 796.

Without saying anything on the question whether an option to purchase contained in a will confers a vested interest before the option is exercised, and, particularly, if the option is only exercisable at an uncertain time, I may observe that the observation was of the nature of an obiter dictum and the point was never in fact argued before the Board. *In re Cousins* (1) and other relevant cases on the point were neither cited nor considered.

My Lords, I have come to the conclusion that the question in this case does not depend on, nor is it affected by, any prima facie view one way or the other. Such an option as is here in question may be given to Edward personally, and, therefore, to be exercised by him and by no one else, or it may be given to him and his executors, administrators and assigns, and not the less that those additional words are not used. It is a matter which depends on the true construction of the will in the light of any surrounding circumstances which may properly be admissible. The passage cited from Jarman on Wills is, I think, incorrect. In my opinion, there are sufficient grounds in this case for holding that the option was personal to Edward, and was, therefore, not assignable or transmissible. It should be noted in the first place that the option according to the express terms of the will was not exercisable until one of two events should happen, namely, the death of the testator's widow or previously thereto when the trustees should "proceed to realize" the shares standing in the name of Edward. It is not, therefore, an immediate unconditional gift of a valuable right, but one to be exercised (if at all) on the happening of the first of two events, and it could not be certain that Edward would be alive when the option became exercisable. That is not in dispute, and I have, therefore, said nothing about an attempt to assign the option by a deed dated July 26, 1932. In the next place it is to be observed that on the death of the widow the whole of the testator's estate was divisible between his sons Edward and Leonard if living. Thus, any exercise of the option would enure to the benefit of Edward at the expense of Leonard. The reference to "the said shares *or any part thereof*" seems to me to suggest that the testator might possibly have thought that, in certain possible events, the elder brother would prefer not to exercise the option or not to exercise it over all the shares. Thirdly it is important to observe that the shares were shares

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(1) 30 Ch. D. 203.

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in a family concern, a private company in which the testator may well have desired his son Edward to continue to hold a substantial interest if alive at the death of the widow. Finally —and this, I think, is the decisive point—the testator himself says that he is "desirous that my said son shall have the "opportunity of becoming absolute owner of the said shares," which, as the testator points out, were held by the son as nominee for his father. This is the reason given for conferring the option, and the same thought is repeated in describing the effect of its exercise. Edward will then become "absolute "owner of the said shares or any part thereof," and all the testator's "estate, interest, right, and title therein." This language would be inappropriate if it extended to a purchase by an assignee or by executors or administrators after the death of the son. I should add that in my opinion *In re Cousins* (1) was rightly decided on the grounds mentioned by Cotton and Lindley L.JJ. The decision of my noble and learned friend Lord Russell of Killowen (then Russell J.) in *In re Madge* (2) was also, if I may be allowed to say so, unquestionably correct.

On these grounds I have arrived at the same conclusion as Scott and Clauson L.JJ., and I observe that Bennett J. would have come to the same conclusion on the question of construction. I move that the appeal be dismissed with costs unless the parties have come to some other agreement in relation to the costs.

LORD RUSSELL OF KILLOWEN. My Lords, I agree with the unanimous view of the Court of Appeal that *In re Cousins* (1) is no authority for the proposition enunciated in the 7th ed. of Jarman on Wills at p. 73. The decision in that case rested, as I read the judgments, simply on the court's view of the true construction of the testator's will, without any question of a presumption either way. In my opinion, that is the correct way of approaching the solution of the problem whether an option given by a will to a person is transmissible to and exercisable by his assigns or his legal personal representatives, or is intended to be personal to the donee and incapable of exercise by anyone else. The solution depends on the intention of the testator as expressed by the words he has used, construed in the light of relevant surrounding circumstances.

I confess that in so approaching the present problem I have not found it one of easy solution. The benefit to be conferred by the exercise of this option was a very valuable one, involving as a condition of its acquisition nothing beyond the payment of a sum of cash to the testator's estate, i.e., a condition the fulfilment of which required nothing in the nature of a qualification personal to the only donee named, namely, Edward. In default of indications to the contrary, one would incline to the view that so valuable a right was to be within the power of Edward to dispose of as and when he wished to realize it, and that, if he neither assigned his right nor personally exercised the option in his lifetime, his estate could reap the benefit after his death: but, on carefully considering the language which the testator has used and the circumstances which existed at the date of his will and to which his language applies, I am driven to the conclusion that the option was intended by the testator to be exercised by Edward and by no one else. The position as regards the 300 shares has already been explained by the noble Lord on the Woolsack. Edward owned the legal interest in them. He was, vis-a-vis the company, the shareholder. The equitable or beneficial interest was in the testator. The language of the will seems to me to be dealing only with the acquisition by Edward of this equitable or beneficial interest. The recital, which leads up to and explains the reason for giving the option to Edward, relates to nothing else, and the reason is stated to be the testator's desire to give Edward the opportunity of becoming absolute owner of the shares of which he was the registered owner, words incapable of application to assigns of Edward or the assigns of his legal personal representatives and (unless they succeeded in having their names placed on the register in respect of the shares) incapable of application to Edward's legal personal representatives. The same remarks apply to the operative provision. Edward is to have the opportunity of purchasing and "becoming "absolute owner of the shares or any part thereof and all my "estate interest right and title therein and thereto." It must be noted that to give Edward the right to "purchase" shares already in his name is a misapplication of the word. What is effectively given to Edward is the right to purchase and become absolute owner of all the testator's estate interest right and title in and to the shares. Again this is a right, the gift of which (according to its terms) can only apply to Edward personally. Furthermore, the testator states that he

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(1) 30 Ch. D. 203. (2) [1928] W. N. 71; 44 T. L. R. 372.

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desires that Edward shall have the "opportunity" of becoming the absolute owner of the shares. I think that the use of the word "opportunity" gives another clue to the testator's intention. It is true that every donee of an option may choose not to exercise it, and in that sense is given an opportunity, but it seems to me that in stating that he gives the option so that Edward may have the indicated opportunity, the testator suggests that the person to whom the opportunity is given may not think fit to avail himself of it, and this at once introduces the idea of the individual opinion of a particular person, in other words, the personal judgment of Edward. Thus, from start to finish of the clause in question there is apparent an indication that the testator is leaving it to the personal decision of Edward whether or not the 300 shares shall be taken out of his residuary estate on payment of their par value.

There are other matters which I understand have influenced some of your Lordships in favour of the respondents, but the features to which I have referred are those which have led me to the conclusion that the order of the Court of Appeal should be affirmed.

LORD MACMILLAN. My Lords, the question is whether a valuable option which the testator by his will conferred on his son, Edward, was personal to his son or transmissible to his son's executors, administrators or assigns. The terms in which the option was conferred and the surrounding circumstances, so far as they may properly be taken into consideration, have been set out by my noble and learned friend on the Woolsack. It is, therefore, only necessary for me to state the reasons which have satisfied me that the option was personal and not transmissible.

The answer to the question is to be sought in the intention of the testator, and his intention must be ascertained, not by conjecture, but by a reasonable interpretation of the language which he has used, aided by such light as may be derived from the relevant facts. There is, in my opinion, no presumption of law one way or the other in the matter, and, I would add, as the point was raised in the course of the debate, that cases on the interpretation of contracts are not entirely apposite, for, as Lord Blackburn reminds us, a will is a soliloquy while the language of a contract is addressed to another: *Grant* v. *Grant* (1).

(1) (1870) L. R. 5 C. P. 727, 728.

First of all, the option here is conferred on the testator's son by name. He is singled out for the benefit and for a very good reason, as will appear. There is no mention of possible representatives, though the words "executors "or administrators" were not foreign to the testator's vocabulary as he shows in his appointment of trustees. If, then, the option is to be held to be transmissible, this must be in virtue of the general principle inherent in the conception of ownership that what a man owns he may dispose of as he pleases. It is true that on the testator's death there passed to his son, Edward, a right to acquire the shares in question at par, and this was a valuable right for the shares were worth about two and a half times par. But what was the nature and quality of the right so acquired? It was not immediately exercisable. Its exercise was postponed until either the death of the testator's wife, when his estate would become distributable, or until at some earlier date the trustees should proceed to realize the shares. If this option was not personal to the son it became transmissible by or through him immediately on the testator's death. It could be transmitted before it could be exercised. The scheme of the testator's directions to his trustees seems to me quite inconsistent with his having intended anything of the sort. The position was that the testator had the beneficial interest in a number of valuable shares in a company conducting a business with which his family was intimately connected. Presumably for some reason of convenience, these shares stood in the name of his son, Edward, as nominal holder. The testator tells us that he is desirous that his son in whose name "as registered "owner" the shares stand should have "the opportunity of "becoming the absolute owner of the same." He then indicates when his son is to have this opportunity and proceeds to give him then the power to convert his titular ownership into beneficial ownership. The qualification to exercise the option is thus seen to be, in the testator's mind, the titular ownership of the shares. The option is an option of "pur-"chasing and becoming the absolute owner of the said shares "or any part thereof." The language both of the preamble to the option and of the operative words appears to exclude the idea that the testator intended the option to be exercisable by a third party who was not already the "registered owner" of the shares and who would not be exchanging the position of nominal owner for that of absolute owner. The option is in effect to convert a nominal ownership into a beneficial ownership, and the qualification of nominal ownership was personal to his son. Moreover, the option is to acquire the shares or "any part thereof," so that it is left to the son, when he comes to make his choice, to decide how many of the shares he wishes to acquire. Such a discretion is not one which the testator is likely to have intended to confide to a third party, possibly a complete stranger.

The matter may be said to be to some extent one of impression, but, in my opinion, the language of the clause which has to be construed, when scrutinized in the light of the circumstances, yields a clear indication of delectus personae on the part of the testator. Accordingly, when Edward, having survived his mother, died without having exercised the option conferred on him, I am of opinion that it ceased to exist to all intents and purposes. I am, therefore, for dismissing the appeal.

LORD WRIGHT. My Lords, I have found this case so nicely balanced that the scales seemed for some time to oscillate within very narrow limits. In the end, however, the balance has to my mind settled in favour of the respondents, notwithstanding the able argument of Mr. Roxburgh.

The case is one which depends on the view taken of the meaning of the testator's words, read in the light of the circumstances which must have been present to his mind and considered with particular reference to the nature of the not perhaps very usual subject-matter of the gift. I regard this will as an individual expression of the testator's mind. A will, it might appear, should be easier to construe than a contract, which involves a consensus ad idem of two minds, whereas a will is the personal and individual expression of the intention of the testator who is figured as soliloquizing or, as it has been said, sitting in his armchair, but I am not sure that the fact that the language of a contract is the combined expression of the two parties does not on the whole help to clarify the interpretation.

The crucial question here is whether the option was personal to the legatee or whether it was transmissible. Except for one circumstance which I shall later state, I should have felt that the option was not of a merely personal character. The shares were marketable things in action, though at a later date subject under the company's articles to a right of pre-emption by the company in certain events. There is nothing to show that the holding of the shares by the legatee was associated with any direct share in the management of the company or that it had any sentimental value attached to it, or that the shares could not have been sold at once by the legatee if he acquired them under the will. The condition of acquiring the shares, if the option was exercised, was simply the payment of a sum of money which anyone could make. The option was a valuable option, not on the face of it different in kind from a similar option conferred by contract inter vivos in the ordinary course of business and in normal course clearly transmissible. The absence of the words "executors, administrators, and assigns" is not significant either way, though if they had appeared the difficulty could not have arisen.

It is, however, clear that an option given in a will may be construed as personal without express words to that effect if it appears that the limitation ought to be inferred on the true construction of the will considered with all the relevant facts in the light of which it is to be read. The peculiarity here is that the will does not simply leave a sum of money or a particular block of shares, but by its language seems to presuppose that the option will be exercised by one who is the registered, though not the beneficial, owner of the shares and who by payment of the par value will acquire full ownership. That may be merely a form of expression, dictated by the actual facts as they existed when the will was made, and not a qualification or condition of the gift, but, on the whole, I have come to the conclusion that the dominant purpose in the testator's mind was that his son should acquire the shares in full ownership, if he should be so minded and paid the specified sum when the time came. This, I think, is confirmed by the wording of the relevant clauses. The recital is "I am desirous that my said son shall "have the opportunity of becoming absolute owner of the "shares." The operative words are that he "shall have the "option of purchasing and becoming absolute owner of the "said shares or any part thereof and all my estate interest "right and title therein and thereto, the value of such shares "for the above purpose to be estimated at par value." There is, indeed, in this the element of bounty. It is a gift of a substantial value in pounds, shillings and pence, represented by the difference between the par value and the market value,

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but I think that the dominant object which, to my mind, emerges from these words is that his son should, if he desire, have the shares. On that view, the option is properly held to be personal to the son. After all, if what the testator intended was to bequeath a particular sum of money to his son, he could have done so simply and directly without the elaborate machinery of a future and conditional option.

The issue is on a razor's edge. I have considered all the cases which have been cited and some others, but one will is not always, or even perhaps generally, likely to be of any help in construing another will. Authorities dealing with other wills are often more likely to mislead than to guide. My decision is based on this particular will itself, and what I deduce from that to have been the testator's intention. I think that the appeal should be dismissed.

LORD PORTER. My Lords, I concur in the conclusions at which your Lordships have arrived.

Appeal dismissed.

Solicitors for appellants: *S. F. Miller, Mathews & Co., for Skelton & Co., Manchester.*

Solicitors for respondents: *Charles Russell & Co., for Skelton & Co., Manchester.*

F. C.

Applied. TUMAHOLE BERENG *v.* THE KING. **[1949] A. C. 253**

[PRIVY COUNCIL.]

Distinguished. GIDEON NKAMBULE *v.* THE KING **[1950] A. C. 379**

J. C.*
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May 20;
July 9.

MAHLIKILILI DHALAMINI AND OTHERS . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF SWAZILAND.

Swaziland—Criminal law—Procedure—Trial — Administrative officers and native assessors—Opinions to be given in open court—Effect of non-compliance—Swaziland High Court Proclamation (No. 65 *of* 1938), *ss.* 7, 8, 10, *sub-s.* 1.

The giving of their opinions by administrative officers and native assessors appointed under ss. 7 and 8 of the Swaziland High Court Proclamation, 1938, to aid and assist the court is part of the

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**Present:* VISCOUNT SIMON L.C., VISCOUNT SANKEY, VISCOUNT MAUGHAM, LORD ATKIN, and LORD ROMER.

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"proceedings" of the High Court which, under s. 10, sub-s. 1, of the proclamation, are to be "carried on . . . . in open court," and such opinions must, therefore, be given in open court.

Prima facie, the failure to hold the whole of the proceedings in public amounts to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by the Judicial Committee in dealing with criminal appeals, although there may be cases where the guilt of the accused is so apparent that, in spite of the disregard of the essential need for publicity, the Board would not consider it right to grant leave to appeal.

Where at the trial of the appellants, who were convicted of murder, a native custom formed an important consideration on which it was essential that the proclaimed necessity for publicity should be observed and the opinions of the administrative officers and the native assessor were in fact given privately to the judge in chambers, the conviction was set aside.

Judgment of the High Court reversed.

APPEAL (No. 38 of 1941), by special leave, from a judgment of the High Court of Swaziland (April 8, 1940) whereby the appellants were convicted of murder and sentenced to death.

The following facts are taken substantially from the judgment of the Judicial Committee: The three appellants, together with the alleged victim, Nkalane Vilakazi, were natives resident in the central district of Swaziland. The case for the Crown was that the three appellants, with a fourth man who also had been convicted, but had since died, agreed together to kill Nkalane in order to use certain parts of his body to make "medicine" to increase their crops. One, Mafukufuka, was alleged to be a party to that conspiracy, and he was called as a witness for the Crown and spoke to the agreement to the killing of Nkalane in the presence of the four accused and himself and to the mutilation of the body. It was alleged that after the killing one Jojosa, a "medicine "man," was summoned by the first accused to supply some old war medicine for a "body." He was told by the first accused that the confederates had killed Nkalane and that the medicine was required to purify them from the killing. According to Jojosa, who gave evidence, he first sent some medicine, then visited the kraal of the first accused where he met the four accused and Mafakufuka, ordered them to kill a black heifer in calf, and with the fœtal fluid and part of the flesh made the necessary brew to achieve the desired purpose. The appellants gave evidence strenuously denying the allegations, and disputed the alleged native customs both as to the medicine for the crops, and for the purification from the killing. The trial took place before Huggard J., aided by two administrative officers, H. B. A. McCarter, deputy resident commissioner, and R. Armstrong, district commissioner, central district, and a native assessor, Macebo Mtetwa, and the appellants were found guilty of murder and sentenced to death. The main question in this appeal was whether the opinions of the administrative officers and the native assessor appointed pursuant to ss. 7 and 8 of the Swaziland High Court Proclamation, 1938 (1), had, to comply with the ordinance, to be given in open court, it having been ascertained by the Board, during an adjournment of the appeal for that purpose, that they were not in fact so given.

1942. May 7, 20. *T. B. W. Ramsay* for the appellants. The trial was not conducted according to law in that the opinions of the two administrative officers and the native assessor were not given or considered by the court as required by ss. 7 and 8 of the Proclamation of 1938, though the appellants and the witnesses were natives living under native conditions and a knowledge of native administration, law, custom and usage was necessary to understand the evidence and assess it at its true value. The words "the opinion . . . . "shall be given" in s. 7 of the proclamation mean, prima facie, given or delivered in open court. The section should

(1) By Swaziland High Court Proclamation, 1938, s. 7: "If "the judge shall so direct, any "trial civil or criminal may be "held and any appeal heard with "the aid of not more than two "administrative officers to be "appointed for that purpose by "the resident commissioner by "notice in the Gazette for such "sittings of the court as may be "specified in that notice. The "opinion of each officer so "associated with the court shall "be given and shall be considered "by the court, but the decision "shall be vested exclusively in "the judge."

Sect. 8: "The High Court "may call to its assistance one or "more native assessors who shall "be chosen by the paramount "chief of Swaziland from coun-"sellors or headmen or other "natives suitably qualified to aid "the court. The assessor or "assessors shall give his or their "opinion and such opinion shall "be considered by the court, but "the decision shall be vested "exclusively in the judge."

Sect. 10, sub-s. 1: "The plead-"ings and proceedings of the "High Court shall be carried on "and the sentences, decrees, "judgments and orders thereof "pronounced and declared in open "court and not otherwise: Pro-"vided however that at any time "during a trial a judge may, if he "thinks fit, order the court to be "cleared or that any person or "class of persons shall leave the "court."

be construed as meaning the same as is expressly enacted in s. 286 of the Criminal Procedure Code of the Gold Coast, in s. 142 of the Nigeria Criminal Procedure Ordinance, and in s. 309 of the Code of Criminal Procedure of India, that is, as if it had been expressly enacted that the opinions should be given orally in open court and recorded. Further, the giving of the opinions is a "proceeding" within the meaning of s. 10, sub-s. 1, of the proclamation, and must, therefore, take place in open court: *Reg.* v. *Fitzgerald* (1); *Lawrence* v. *The King* (2).

Sir D. P. Maxwell Fyfe S.-G. and *Preedy* for the respondent. Until the passing of the proclamation of 1938, the giving of the opinions of administrative officers and native assessors must have been in private unless the court decided that the opinions should be recorded and form part of the proceedings. "Proceedings" in s. 10, sub-s. 1, of the proclamation is a compendious description of all forms of process of law—actions, suits, prosecutions—and has the widest connotation possible in this, its primary meaning. The words "pleadings "and proceedings" in s. 10 are, therefore, quite general, and should not be construed as determining whether any particular matter is to be dealt with in open court or not. Provided the opinion is given and considered, it does not help an accused person at his trial to know what the opinion is, and, so far as concerns appeal, he need be under no disadvantage because the appellate court can discover it. The omission of the word "orally" to qualify "given" and "give" in ss. 7 and 8 must be taken to have been deliberate, and those sections must be construed according to the subject-matter and in the light of the facts that in Swaziland the use of the administrative officers and assessors is discretionary, that the former are persons who, up to this proclamation, would have been members of the court, that the native assessors are chosen for their qualifications, and that the word "aid" is used in s. 7, and "assistance" in s. 8. The collective effect of these points is that the expression of opinion by the administrators and assessors is closely connected with and peculiarly within the purview and regard of the judge himself, who decides whether he shall have assessors for his aid and assistance and, if so, how he shall employ them. Taking ss. 7, 8 and 10 together, it was not intended to lay down that the proceedings should be carried on in such a way as to make it necessary that what

(1) (1889) 15 Vict. L. R. 40.

(2) [1933] A. C. 699.

was essentially private should be discussed and pronounced in open court. [*Owners of S.S. Australia* v. *Owners of Cargo of S.S. Nautilus* (1) was referred to.] Assuming, however, that there has been an infringement of the proclamation, the matter is not such as calls for interference by the Board. The opinions were given and considered, and they were unanimous and in complete accord with the decision in the judgment. Therefore, no injustice was done: *In re Dillet* (2). The error was procedural and did not go to jurisdiction as regards sentence.

At the conclusion of the argument their Lordships, after consultation, stated that they would advise His Majesty to allow the appeal and set aside the conviction, and that their reasons would be delivered later.

July 9. The reasons of their Lordships' report were delivered by LORD ATKIN, who stated the facts and continued: It is obvious that grave questions arose as to the value of the evidence both of Mafukufuka and of Jojosa. The former was clearly an accomplice and the latter also, so far as he was an accessory after the fact. There were further questions as to discrepancies between the evidence they had given at the preliminary examination, and at the trial. Their Lordships, however, at the hearing of the appeal reserved discussion by counsel of these points, and decided to hear in the first instance the complaint as to an alleged violation of the rules governing criminal trials in Swaziland, which is the matter on which they eventually decided to advise that the convictions be set aside.

Swaziland, which before the conquest of the Transvaal in 1903 had been governed by the South African Republic, on that conquest was taken over by the British government who, by an Order-in-Council in 1903, made provision for its administration. By a proclamation of October 15, 1904, the laws in force in the Transvaal at that date were put in force in Swaziland so far as applicable, a provision which was modified by a proclamation of 1907 which provided that the Roman-Dutch common law, save in so far as the same had been or might from time to time be modified by statute, should be law in Swaziland. There was a similar provision with respect to the existing statute law. Their Lordships mention these provisions to show that the nature of the common law has not been overlooked. They have not, however, been referred to any rule of the Roman-Dutch common law affecting the present matter which appears to be governed entirely by legislative enactments contained in proclamations by the High Commissioner for South Africa to whom is entrusted the legislative power in Swaziland. By the Swaziland High Court Proclamation, 1938, there was established the High Court of Swaziland, to whom a single judge was assigned having original jurisdiction in civil and criminal matters and appellate jurisdiction in respect of subordinate courts. [His Lordship read ss. 7, 8 and 10, sub-s. 1, of the Proclamation of 1938, and continued :] It will be noticed that the two administrative officers are not styled "assessors." The trial, if the judge so directs, is to be held with their "aid," and they are said to be "associated with the court." The native assessor is called to the assistance of the court. Nothing seems to turn on this distinction. Both administrative officers and native assessor are to give their opinion, and the respective opinions are to be considered by the court, but the decision is to be vested exclusively in the judge.

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(1) [1927] A. C. 145, 153.

(2) (1887) 12 App. Cas. 459.

If the matter rested on ss. 7 and 8 alone, it would appear that the direction to "give the opinion" is a direction to give the opinion in court as part of the proceedings at the trial as the judge "gives" his judgment, but when read in conjunction with s. 10 the effect of the sections seems plain. The giving of the opinions is part of the proceedings of the High Court which are to be carried on in open court. The giving of the opinions must, therefore, under the enactment take place in open court. There was no indication in the record before their Lordships when the appeal was first opened whether the opinons had been given at all or how or when. Though the point had been taken by the appellants in their petition for special leave to appeal, dated April, 1941, no information on the subject had been sought by or given to the representatives of the Crown in this country, and the Crown in their case for the respondent contended that the maxim omnia praesumuntur rite esse acta applied, which apparently meant that, if the opinions ought to have been given in public, it ought to be presumed that they were so given. Their Lordships were not content to rely on a presumption of this kind in a capital case, and they directed that a telegram should be sent to the resident commissioner asking for specific information on the matter, and his reply established that the opinions of the officers and of

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the native assessor were given in private to the judge, contrary to the provisions of the proclamation. Their Lordships find nothing in the previous proclamations referred to in the learned judge's observations which throw any light on the construction of the present proclamation, nor can they accept a construction other than what they have indicated by reason of the fact, as stated, that the practice adopted in this case has been invariably observed in similar trials in the protectorate and elsewhere. It was suggested that, so far as the native assessor was concerned, if his opinion had to be given in public he might feel constrained to decide in favour of a native accused, whereas, in the privacy of the judge's room and in company only of the judge and the administrative officers, he would be more likely to give an honest independent opinion. It was said that this was a good reason for construing the section as justifying the practice in fact adopted. Their Lordships cannot accept this contention. It would, in any case, afford insufficient reason for disregarding the plain meaning of the words used, but their Lordships do not take the view indicated of the respective probabilities of obtaining an honest opinion. In at least three codes with which their Lordships are familiar—those of India (Code of Criminal Procedure, 1898, s. 309), Gold Coast (Criminal Procedure Code (1936 Revision), s. 286) and Nigeria (Criminal Procedure Ordinance, 1914, s. 142)—where trial is with the aid of native assessors, the assessor is directed to give his opinion orally in open court. These codes cannot, of course, be considered as throwing any light on the construction of the Swaziland code. They make express provision for the opinion being given in public. But they do indicate that in the countries named there need be no such fear of a dishonest public statement by a native assessor as to make it desirable to be given in private. The analogy in the cases of Nigeria and the Gold Coast are, no doubt, closer than is the case of India. It must, further, be remembered that the provision for giving the judge, at his request, the assistance of a native assessor cannot be regarded solely from the point of view of aid given to the judge. It operates, and no doubt is intended to operate, as a safeguard to natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood. From this point of view the importance of publicity is manifest. Under the present practice, judging by the present record, it is not made known to the public whether

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any opinion was given at all by the assessor, or what it was. The High Commissioner alone is informed in the judge's report. So far is it kept secret that it was not until this appeal was opened and a special request for information addressed by their Lordships to the protectorate that the facts were made known for the purpose of appeal. There seems, therefore, no reason for refusing to give to the sections in the proclamation the meaning which the words clearly indicate.

What, then, should be the result of a failure to comply with the proclamation and to hold the whole of the proceedings in public ? In this country the omission would be a fatal flaw entitling a convicted criminal to have the conviction set aside. An analogous case is where the judge has either pronounced sentence or altered sentence in the absence of the accused, see *Lawrence* v. *The King* (1), where a judge in Nigeria had altered sentence both in the absence of the accused and when sitting in chambers. Prima facie, the failure to hold the whole of the proceedings in public must amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board in dealing with criminal appeals. There may, no doubt, be cases where the guilt of the accused is so apparent that in spite of the disregard of this essential need for publicity this Board would not consider it right to grant leave to appeal, but the present is not such a case, as a particular native custom formed an important consideration on which it was essential that the proclaimed necessity for publicity should be observed. For these reasons their Lordships came to the conclusion that they should recommend to His Majesty that the appeals should be allowed.

Solicitors for appellants : *A. L. Bryden & Co.*
Solicitors for respondent : *Burchells.*

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(1) [1933] A. C. 699.

[PRIVY COUNCIL.]

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CANADIAN PACIFIC RAILWAY COMPANY . . . . APPELLANT;

AND

LOCKHART . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Master and servant—Negligence of servant—Liability of master—Scope of employment—Motor-car—Uninsured—Use prohibited—Accident in course of employment.

Where a servant of the appellant company, in disregard of written notices prohibiting employees from using privately owned motor-cars for the purposes of the company's business unless adequately protected by insurance, used his uninsured motor-car on a journey for the purpose of, and as a means of execution of, work which he was ordinarily employed to do, and by negligent driving injured the respondent:—

Held, that the means of transport was incidental to the execution of that which he was employed to do, and that the prohibition of the use of an uninsured motor-car merely limited the way in which, or by means of which, he was to execute the work, and that breach of the prohibition did not exclude the liability of the company to the respondent.

Plumb v. *Cobden Flour Mills Co., Ld.* [1914] A. C. 62, 67, and *Goh Choon Seng* v. *Lee Kim Soo* [1925] A. C. 550, 554, referred to.

Statement of principle in Salmond on The Law of Torts, 9th ed., at p. 95, approved.

Judgment of Supreme Court of Canada [1941] S. C. R. (Can.) 278, affirmed.

APPEAL (No. 52 of 1941), by special leave, from a judgment of the Supreme Court of Canada (April 4, 1941) reversing a judgment of the Court of Appeal for Ontario (December 15, 1939) which had affirmed a judgment of the Hon. H. E. Rose, Chief Justice of the High Court (July 12, 1939).

The following facts are taken from the judgment of the Judicial Committee: This appeal concerned solely the responsibility of the appellant railway company for injuries received by the infant respondent owing to the negligent driving of a motor-car owned and driven by one Stinson who was employed by the appellant as a carpenter and general handy-man. The material facts, which were not in dispute,

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**Present:* VISCOUNT MAUGHAM, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROMER.

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were stated by Rose C.J., H.C., who tried the case (1), in his judgment as follows: "The defendant Stinson had been for "many years in the defendant [appellant] company's service. "It is in the course of his employment to make repairs of many "kinds to the company's property, movable and immovable. "His immediate superior is the foreman of the bridge and "building department at the company's works at West "Toronto, and his own headquarters are at those works, but "his duties take him from time to time to other premises of "the company in and out of Toronto, all of which can be "reached by the company's lines of rails. At West Toronto, "Stinson had made a key for use in a lock in the station at "North Toronto. He had made it from a pattern, and he "was authorized or instructed by his foreman to go to North "Toronto and try it in the lock. He is paid by the hour, "and would have been paid for the time occupied in the "journey. The company keeps at West Toronto vehicles of "three types for the use of the employees in connection with "their work—a 'speeder,' a 'track-motor,' and a 'hand-car,'— "all of which run on the company's rails, and sometimes, "when it is more convenient, a man proceeding from one part "of Toronto to another is instructed or permitted to travel "by tram-car and is furnished with tickets. On this occasion "nothing was said as to how Stinson was to get to North "Toronto, but the track-motor and the speeder were in the "shop available for use, and the foreman assumed that the "track-motor would be used. Stinson, however, had a motor "car of his own nearby, and, without communicating his "intention to anyone, he decided to use it. He did use it, "and on his way to North Toronto he injured the infant "plaintiff. The company, by its divisional superintendent, "and over his signature, had issued two notices concerning "the use by its employees of privately-owned motor-cars in "connection with the company's business. The first, dated "December 28, 1937, was as follows: 'All Concerned: The "'use by employees of their own cars in connection with the "'company's business has been forcibly brought to our "'attention by possible heavy claims against the company "'in recent accidents, and, after a check-up of the situation "'it develops that a large number of such employees do not "'carry public liability or property damage insurance. As a "'continuance of this practice is likely seriously to involve

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(1) [1939] O. R. 517.

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"'the company, privately-owned automobiles are not to be "'used in connection with the company's business unless the "'owner carries insurance against public liability and property "'damage risks. Please be governed accordingly.' The "second, dated March 21, 1938 (i.e., just less than four months "before the accident which gave rise to this action), was as "follows: 'All Concerned: Referring to my circular letter of "'December 28, 1937, regarding the use of privately-owned "'automobiles not covered by insurance in the execution of "'company's business. Since then, several instances have "'come to notice where employees had used unprotected "'automobiles contrary to the instructions. In one case, a "'telegraph messenger undertook to use an automobile while "'his bicycle was undergoing repairs, and had the misfortune "'to strike and injure a prominent citizen. As a result, a "'heavy claim has been preferred against the company on "'the grounds that the messenger was transacting company's "'business at the time. It is a serious matter to involve the "'company in expenditure of this nature, and all concerned "'must clearly understand that automobiles not adequately "'protected by insurance must not be used in the execution of "'company's business. Will you kindly take whatever steps "'are necessary to see that the instructions in this regard are "'being adhered to.' Copies of these notices had been read "by the foreman at West Toronto to his men, including "Stinson, and had been posted up and left posted in a "prominent place for all to see, and Stinson's attention had "very directly been called to the order on one occasion when "an act of disobedience on his part had come to the foreman's "attention. This one breach of the order by Stinson seems "to have been the only breach on the part of any of the men "who were under the orders of the foreman at West Toronto "which had come to his (the foreman's) attention, and there "is no possibility of finding that the company or any of "Stinson's superiors in the company's service had winked at "the non-observance of the rule. Had there been evidence "on which such a finding could be based, a question as to the "fact would have been submitted to the jury. Stinson "carried no insurance, and when he set out for North Toronto "in the uninsured car he knew he was doing what he had "been forbidden to do." After reviewing the authorities, the learned judge said (1): "In the present case, to say that it

(1) [1939] O. R. 523.

"was the duty of the defendant, Stinson, to go to North "Toronto, that he went negligently and by his negligence "caused damage, and, therefore, that his master is liable, is "to make a plausible but, in my opinion, an inaccurate statement. After much consideration, my opinion is that the "driving of a privately-owned and uninsured motor-car was "not an act falling within the class of acts which Stinson was "authorized to perform, and, therefore, that his negligence in "the handling of such a car, even at a time when he was "engaged in his master's business, does not bring his master "under liability. It may be—indeed, it seems probable—"that from the notices posted up there is to be inferred a "permission to drive insured cars, but I do not think that the "case can be dealt with on the footing that there was a general "authority to drive motor-cars, coupled with an instruction "to see to it that every car driven was adequately covered. "The company having provided means of transport, I think "it was not in the course of Stinson's employment to provide "other means which he happened to prefer, and that, even if, "from the notices, a permission to drive an insured car was "to be inferred, that permission was not effective to bring "the driving of an uninsured car within the scope of the "employment."

The learned judge, accordingly, dismissed the case as against the appellant company, and on December 15, 1939, an appeal by the plaintiffs was dismissed by the Court of Appeal for Ontario by a majority of four judges to one. Masten J.A., in whose judgment on this point Middleton and Gillanders JJ.A. concurred, said, after a reference to the two circular notices, which were brought to Stinson's attention (1): "Some time "later, Stinson, without placing insurance on his car, used it "again in disobedience of the company's prohibition. This "occurrence came to the notice of McLeod, and Stinson was "summoned by McLeod and reprimanded. The details of that "interview do not appear in the evidence. He was not "dismissed, but remained in [company's] employ. McLeod "had not authority to discharge him. But if Stinson, at that "interview with his superior officer, had refused to be debarred "from going to work in his uninsured motor, there could have "been only one result, namely, his dismissal. There can be only "one inference drawn from the continuance of his employment, "namely, that the scope of his employment was thereafter, by

(1) [1940] O. R. 140, 152-3.

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"his consent, definitely limited by excluding any right to "travel to his work in his own motor so long as it remained "uninsured . . . . When on the date of the accident in "question he set out for his work by driving his uninsured "car, he violated the terms of his implied agreement, "disobeyed the prohibition of his employer, and was guilty "of wilful misconduct for his own convenience and purpose. "In my opinion, the act of setting out on his journey "in his uninsured car placed Stinson outside the scope of his "authority so that he was acting not as a servant of the "railway, but as a stranger engaged on his own enterprise." Fisher J.A. held that Stinson, by disobedience to his instructions, in operating his uninsured motor vehicle out in the street clearly placed himself during that period out of the control of his master, and his act was in truth his own act, and not his master's, and his act was not only outside the course and scope of his employment, but had the effect of placing himself beyond the control of his master. McTague J.A., who dissented, after a review of the cases, stated (1): "In applying the principle to the present case, "it seems perfectly clear that in transporting the key from "West Toronto to North Toronto Stinson was about his "master's business. Did he, because of the mode of transportation which he used, divest himself of the character of "servant and become a stranger to his employer? I do not "think so. If in the course of his trip he had gone off on a "venture of his own and injured someone, it might well be "said that in doing that he had lost his character of servant. "On the occasion in question here he was not using a means "of transportation which in itself was prohibited. He was "merely disobeying an injunction of his employer that he "should insure his car and thus, at his own expense, provide "practical indemnity to his employer for liability to third "persons. Disobedience by the servant may be a cause for "dismissal by the master, but in se is not a defence to liability "of the master to third persons under the doctrine of respondeat "superior."

On appeal, on April 4, 1941, this decision was unanimously reversed by the Supreme Court of Canada, and judgment was entered against the company, who obtained special leave to appeal therefrom to His Majesty in Council. The opinion of Duff C.J. and Davis J. was delivered by the learned Chief

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(1) [1940] O. R. 168.

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Justice, who held that the evidence, as it stood, all pointed to the conclusion that the company's officers were indifferent to the observance of the order contained in the circular notices, and that Stinson, in using his automobile in the company's service on the occasion in question, had no idea that he was not acting in the company's service, and, after a discussion of the cases, stated (1): "Here Stinson was not only engaged in "his master's service at the time he was driving his motor-car, "he was performing a duty of the service in getting himself "conveyed to the place where it was his duty to go. He was "on his master's business in conveying himself there by his "car, unless the respondent's contention is sound that by "reason of the order and of the absence of insurance his act "in driving his car on the company's business was of such a "character, as already observed, as to sever the relationship "of service. That I have dealt with." The judgment of Rinfret and Kerwin JJ. was delivered by Kerwin J., who held that he was entitled to draw the inference from the facts that Stinson had not severed his relations with his employer, that he was performing his duty to his master in going to North Toronto, and was using a conveyance of a kind at least impliedly authorized and was acting within the scope of his employment. Crocket J., after referring to the cases, says (2): "If the question were not concluded by the undisputed and "indeed the admitted fact that Stinson was using his car in "journeying to the North Toronto station in connection with "and in furtherance of his master's business, I should have "thought that the only possible inference from the district "superintendent's circular letters, on which the judgment "a quo is entirely based, was that he and all other employees "in the Toronto district were thereby authorized to use their "own or any other privately-owned cars in connection with "their master's business, provided that they were insured "against public liability and property damage. It was thus "in no sense a definite prohibition against the use of motor-cars "in connection with the respondent's business, but a purely "conditional or contingent prohibition, apparently made for "no other purpose than that of transferring from the master "to the automobile insurance companies the obligation of "paying for injuries resulting to third persons from the "negligence of its servants while engaged in the prosecution "of its business, and one which clearly recognized the right of

(1) [1941] S. C. R. (Can.) 293-4.

(2) Ibid. 315.

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"the company's employees to use motor-cars so insured for "that purpose. I should have had no hesitation in holding "that a prohibition of such a character could not, under the "law as recognized by this court in accordance with the "principles laid down by the House of Lords and the Judicial "Committee of the Privy Council, have the effect of so "curtailing the scope of Stinson's employment, in the capacity "of a permanent general repairs man, as to transform his act "in using his uninsured car solely for the purpose of his "master's business on the occasion in question into an act "undertaken wholly for his own personal gratification, the "servant was using his master's time as his master's servant."

1942. June 18, 22. *Pritt K.C.* and *Leonard Stone* for the appellant company. It is not disputed that employees are entitled to use their own cars when on company's business if they are properly insured. The view of the trial judge may be put forward as a major part of my argument (1): "The "driving of a privately-owned and uninsured motor-car was "not an act falling within the class of acts which Stinson was "authorized to perform, and . . . . his negligence in the "handling of such a car, even at a time when he was engaged "in his master's business, does not bring his master under "liability . . . . Even if, from the notices, a permission to "drive an insured car was to be inferred, that permission was "not effective to bring the driving of an uninsured car within "the scope of the employment." A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment: Salmond on The Law of Torts, 9th ed., p. 94, and at p. 98 it is stated that: "Prohibition "is relevant in considering what the scope of the servant's "employment was, and therefore in determining whether the "wrongful act was or was not a mode of exercising that "employment, but it is powerless to exclude an employer's "liability for the wrongful acts of his servant within the "sphere permitted to him." There are two elements in favour of the appellant company, first, that Stinson was not employed as a car driver, and, secondly, that, being a person whose work involved travelling, he had a qualified permission to use a method not supplied by his employer. Driving an uninsured car is not a mode of driving at all. It is doing something which is forbidden. This case is entirely different from

(1) [1939] O. R. 523.

Limpus v. *London General Omnibus Co.* (1). Stinson was not employed to drive an uninsured motor-car, and he was not acting in the course of, or within the scope of, his employment in doing so. [Reference was made to *Goh Choon Seng* v. *Lee Kim Soo* (2), *Joseph Rand, Ld.* v. *Craig* (3), *Goodman* v. *Kennell* (4) in which, on appeal, it was stated that "A master "would not, certainly, be liable for an act done by his servant "whilst riding the horse of another, without his knowledge, "or against his consent" (5); *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (6), and *Century Insurance Co., Ld.* v. *Northern Ireland Road Transport Board* (7).]

Gahan for the respondent. Stinson was employed to get from West Toronto to the station at North Toronto and the fact that he did it in a forbidden way did not take him out of the employment of his master. He was doing an authorized thing in an unauthorized and improper manner, and the general law is that the master is responsible for the way in which the servant does the work even though it be in breach of specific directions: *Lloyd* v. *Grace, Smith & Co.* (8). The leading case on the question of a servant who departs from the authority given to him is *Limpus* v. *London General Omnibus Co.* (9), where the dissenting judge really puts the argument which the appellant has advanced here, namely, that the prohibition of the act puts the act outside the scope of the employment. The other judges took the view that the prohibition was immaterial. In *Black* v. *Christchurch Finance Co.* (10) it was said that: "Having authorized and entrusted "the operation of burning to another they must answer for "his proceedings, however much he may have violated their "instructions or the detailed conditions of his contract with "them." [Reference was also made to *Bugge* v. *Brown* (11), *Ricketts* v. *Thos. Tilling, Ld.* (12), *Century Insurance Co., Ld.* v. *Northern Ireland Road Transport Board* (7), and *Williams* v. *Jones* (13).] The cases cited are mere illustrations of the application of the principle, and the facts of this case fall within the principle there laid down.

Pritt K.C. replied.

(1) (1862) 1 H. & C. 526.
(2) [1925] A. C. 550.
(3) [1919] 1 Ch. 1.
(4) (1827) 3 C. & P. 167.
(5) (1828) 1 M. & P. 241, 244.
(6) (1873) L. R. 8 C. P. 148.
(7) Ante, p. 509.
(8) [1912] A. C. 716.
(9) 1 H. & C. 526, 534-541.
(10) [1894] A. C. 48, 55-6.
(11) (1919) 26 C. L. R. 110, 116, 132.
(12) [1915] 1 K. B. 644, 647.
(13) (1865) 3 H. & C. 602, 608.

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August 5. The judgment of their Lordships was delivered by LORD THANKERTON, who stated the facts and continued: Their Lordships agree with the decision of the Supreme Court, and, in particular, with the reasons given by Crocket J., as also with the reasoning of McTague J.A. in his dissenting judgment in the Court of Appeal, in the passages already quoted. There is little dispute as to the facts, but their Lordships prefer to proceed on the statement of the learned trial judge that there was no evidence on which it could be found that the company had winked at the non-observance of their prohibition, rather than on the view expressed by some of the learned judges of the Supreme Court to a contrary effect.

The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles, their Lordships agree with the statement in Salmond on Torts, 9th ed., p. 95, namely: "It is clear that the master is responsible for acts "actually authorized by him: for liability would exist in this "case, even if the relation between the parties was merely "one of agency, and not one of service at all. But a master, "as opposed to the employer of an independent contractor, "is liable even for acts which he has not authorized, provided "they are so connected with acts which he has authorized "that they may rightly be regarded as modes—although "improper modes—of doing them. In other words, a master "is responsible not merely for what he authorizes his servant "to do, but also for the way in which he does it . . . . On "the other hand, if the unauthorized and wrongful act of the "servant is not so connected with the authorized act as to be "a mode of doing it, but is an independent act, the master is "not responsible: for in such a case the servant is not acting "in the course of his employment, but has gone outside of it." The well-known dictum of Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co., Ld.* (1) that "there are prohibitions which "limit the sphere of employment, and prohibitions which only "deal with conduct within the sphere of employment," may be referred to. Their Lordships may also quote passages from the judgment of this Board in *Goh Choon Seng* v. *Lee Kim Soo* (2), which was delivered by Lord Phillimore: "The "principle is well laid down in some of the cases cited by the "Chief Justice, which decide that 'when a servant does an act

(1) [1914] A. C. 62, 67.

(2) [1925] A. C. 550, 554.

"'which he is authorized by his employment to do under "'certain circumstances and under certain conditions, and he "'does them under circumstances or in a manner which are "'unauthorized and improper, in such cases the employer is "'liable for the wrongful act . . . .' As regards all the cases "which were brought to their Lordships' notice in the course "of the argument this observation may be made. They fall "under one of three heads: (1.) The servant was using his "master's time or his master's place or his master's horses, "vehicles, machinery or tools for his own purposes: then the "master is not responsible. Cases which fall under this head "are easy to discover upon analysis. There is more difficulty "in separating cases under heads (2.) and (3.). Under head "(2.) are to be ranged the cases where the servant is employed "only to do a particular work or a particular class of work, "and he does something out of the scope of his employment. "Again, the master is not responsible for any mischief which "he may do to a third party. Under head (3.) come cases "like the present, where the servant is doing some work which "he is appointed to do, but does it in a way which his master "has not authorized and would not have authorized, had he "known of it. In these cases the master is, nevertheless, "responsible." In *Goh Choon Seng's* case (1) the appellant's servants had been employed by him to burn vegetable rubbish collected on his land, and they burnt some of it by lighting fires on Crown land left waste and uncultivated which was wedged in between the appellant's land and that of the respondent, with the result that the fires spread to the respondent's land and caused damage to his property. The appellant was held liable to the respondent.

In the opinion of their Lordships, the present case does not fall under the first head of Lord Phillimore's classification. That the use of his own motor-car for the journey might be the more convenient means of transport for Stinson does not alter the fact that he was performing the journey for the purpose of, and as a means of execution of, the work which he was employed to do. In these cases the first consideration is the ascertainment of what the servant was employed to do. The existence of prohibitions may, or may not, be evidence of the limits of the employment. In the present case Stinson was employed to work as a carpenter and general handy-man, and for that purpose he required to go from his headquarters at West Toronto station to other railway buildings of the

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company throughout Toronto and district. The means of transport used by him on these occasions was clearly incidental to the execution of that which he was employed to do. He was not employed to drive a motor-car, but it is clear that he was entitled to use that means of transport as incidental to the execution of that which he was employed to do, provided the motor-car was insured against third-party risks. If the prohibition had absolutely forbidden the servant to drive his motor-car in course of his employment it might well have been maintained that he was employed to do carpentry work and not to drive a motor-car, and that, therefore, the driving of a motor-car was outside the scope of his employment, but it was not the acting as driver that was prohibited, but the non-insurance of the motor-car, if used as a means incidental to the execution of the work which he was employed to do. It follows that the prohibition merely limited the way in which, or by means of which, the servant was to execute the work which he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties.

Their Lordships are, therefore, of opinion that the appeal fails, and they will humbly advise His Majesty that the appeal should be dismissed, with costs as between solicitor and client, and that the judgment of the Supreme Court of Canada should be affirmed.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

Principle enunciated by LORD WRIGHT, *followed.* BISHOP *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 22.

Applied. BISHOP *v.* CUNARD WHITE STAR CO. [1950] P. 241

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DAVIES AND ANOTHER . . . . APPELLANTS;

AND

POWELL DUFFRYN ASSOCIATED COLLIERIES, LIMITED . . . . RESPONDENTS.

Negligence—Fatal accident—Damages—Measure—Claims under both Fatal Accidents Acts and Law Reform (Miscellaneous Provisions) Act, 1934—Award under Act of 1934—Fatal Accidents Acts, 1846 to 1908—Law Reform (Miscellaneous Provisions) Act, 1934

**Present:* LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, LORD PORTER and LORD CLAUSON.

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(24 & 25 *Geo.* 5, *c.* 41), *s.* 1, *sub-s.* 5—*Appeal—Review of award of damages by judge.*

By s. 1, sub-s. 5, of the Law Reform (Miscellaneous Provisions) Act, 1934: "The rights conferred by this Act for the benefit of "the estates of deceased persons shall be in addition to and not "in derogation of any rights conferred on the dependants of "deceased persons by the Fatal Accidents Acts . . . ."

Damages recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934, must be taken into account in assessing damages under the Fatal Accidents Acts, 1846 to 1908, in the case of dependants who will benefit from the damages under the Act of 1934, for s. 1, sub-s. 5, of the Act of 1934 does not establish a statutory exception to the general rule that, in the assessment of damages under the Fatal Accidents Acts, any benefit accruing to a dependant by reason of the relevant death must be taken into account.

Decision of the Court of Appeal (sub nom. *Yelland* v. *Powell Duffryn Associated Collieries, Ld.*) (*No.* 2) [1941] 1 K. B. 519, affirmed on this point.

Where an action is brought under the Fatal Accidents Acts and it is not clear whether or not a subsequent action under the Law Reform (Miscellaneous Provisions) Act, 1934, will be brought, the court, in assessing damages under the Fatal Accidents Acts, must make the best estimate it can of the benefit which the parties would be likely to obtain under the Act of 1934 and deduct that sum from the amount which would otherwise be awarded under the Fatal Accidents Acts.

Observations on a review by an appellate court of a judge's award of damages.

APPEAL from the Court of Appeal (1).

The facts stated by Lord Macmillan, were as follows: On September 6, 1938, Daniel Davies and John Sidney Williams, colliers in the employment of the respondents, were fatally injured by an explosion in one of the respondents' mines. Actions were raised in the High Court in May, 1939, against the respondents by Mrs. Davies and Mrs. Williams, each suing as the administratrix of her deceased husband. In these actions the plaintiffs attributed the accident to breach of statutory duty and negligence on the part of the respondents, and each claimed damages (*a*) under the Fatal Accidents Acts, 1846 to 1908, on behalf of the deceased's dependants, and (*b*) under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the deceased's shortened expectation of life. There was also a claim in each case for funeral expenses. The actions were consolidated with an action at the instance of the widow of David John Yelland who also lost his life in

(1) [1941] 1 K. B. 519.

the same accident. The cases were heard by Lewis J. at Cardiff Assizes in March, 1940. Having decided the question of liability in favour of the appellants the learned judge proceeded to consider the question of the damages to be awarded in each case. The deceased Davies was a man of twenty-three years of age, in sound health and regular employment, earning an average weekly wage of 2*l.* 2*s.* 4*d.*, the whole of which he gave to his wife who handed him back 5*s.* as pocket money. He died intestate leaving the appellant his widow, twenty-one years of age, a daughter aged two years and a son aged six months. The widow and children were entirely dependent on the deceased's earnings. The deceased Williams was forty-two years of age, also in sound health and regular employment, and his average weekly earnings were 3*l.* 15*s.* 5*d.*, the whole of which he gave to his wife, who handed him back small sums not exceeding half a crown a week for pocket money. He died intestate, leaving the appellant his widow, forty-three years of age, and six children. The widow and three of the children, namely, two daughters aged respectively thirteen and ten years and a son aged seven years, were entirely dependent on the deceased's earnings. The three other children were self-supporting. With these facts before him the learned judge assessed and apportioned the damages as follows :—

A. In the Davies case—	
I. Under the Fatal Accidents Acts	
To the widow	5*l.*
To the daughter..	100*l.*
To the son	150*l.*
II. Under the Law Reform Act	
To the widow	700*l.*
together with 14*l.* for funeral expenses.	
B. In the Williams case—	
I. Under the Fatal Accidents Acts	
To the widow	5*l.*
To the elder daughter	50*l.*
To the younger daughter ..	75*l.*
To the son	100*l.*
II. Under the Law Reform Act	
To the widow	250*l.*
together with 15*l.* for funeral expenses.	

In fixing the sum of 5*l.* as damages payable to the widow in each case under the Fatal Accidents Acts the learned judge took into account the sum he had assessed as damages under the Law Reform Act which in each case would go entirely to the widow as both of the deceased died intestate and neither left an estate exceeding 1000*l.* What the learned judge in substance did was to give to the appellant Mrs. Davies under the Fatal Accidents Acts 705*l.* less 700*l.* awarded under the Law Reform Act, and to the appellant Mrs. Williams under the Fatal Accidents Acts 255*l.* less 250*l.* awarded under the Law Reform Act. The respondents appealed on the question of liability. The appellants cross-appealed (1.) on the question whether in law the learned judge in assessing damages under the Fatal Accidents Acts was entitled to take into account the damages awarded under the Law Reform Act, and (2.) for revision of the sums awarded as being inadequate. The Court of Appeal affirmed the decision of the learned judge on liability (1) and then dealt with the cross-appeal, which they dismissed (2). The lords justices were unanimous in holding that damages awarded under the Law Reform Act must be taken into account in assessing damages under the Fatal Accidents Acts, but on the question of amount Luxmoore L.J. was in favour of increasing the damages to the appellant, Mrs. Williams, under the Fatal Accidents Acts to 750*l.* at least, which, after taking into account the 250*l.* awarded to her under the Law Reform Act, would give her a net sum of 500*l.* instead of 5*l.* The question of liability was not further contested, but the appellants appealed to the House of Lords on both the points decided against them. The widow of Yelland did not appeal.

Paull K.C. and *Griffith Williams* for the appellants. The general rule that in assessing damages under the Fatal Accidents Acts any benefit accruing to a dependant by reason of the relevant death is made subject to a statutory exception created by s. 5, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934. The words "shall be in addition to "and not in derogation of" are cumulative and not tautological, and they involve a direction not to deduct from or diminish the damages under the Fatal Accidents Acts to which they must refer. "Derogate" means "diminish": Oxford English Dictionary; see also *Birmingham, Dudley & District Banking Co.* v. *Ross* (3) and Various Industries (Silicosis) Scheme, 1931 (St. R. & O. 1931, No. 342), para. 2 (iii.). No sums recovered under the Act of 1934, therefore, are to be

(1) [1941] 1 K. B. 154.
(2) [1941] 1 K. B. 519.
(3) (1887) 38 Ch. D. 295, 313, 314.

taken into account in assessing damages under the Fatal Accidents Acts. The causes of action under the two Acts are distinct and independent, and the word "rights" in sub-s. 5 covers all rights, including the right to recover a sum of damages, so that the right under the Fatal Accidents Acts is not to be derogated from or diminished by reason of the right of action under the Act of 1934 or damages recovered under it. The legal personal representatives of the deceased might be different from the persons entitled to compensation under the Fatal Accidents Acts. They might be unwilling to bring an action, or it might be uncertain whether they would subsequently bring an action, and, if there were any question of deduction, difficulties would arise in consequence. Further, in the case of the Fatal Accidents Acts the court could under R.S.C., O. XXII., r. 14, sub-rr. 2, 3 and 9, keep control of the sums recovered by the dependants but, in the case of a widow recovering under the Act of 1934, it would have no such power. The true view is expressed by Lord Roche in *Rose* v. *Ford* (1) and the opinions of Lord Atkin and Lord Wright must be read in the light of it. Though the dependants cannot get compensation twice over in respect of the potential future earning power of the deceased, there is no overlapping, since the Act of 1934 is concerned, not with future earnings, but with loss of expectation of life: *Benham* v. *Gambling* (2). [They referred to *Avery* v. *London & North Eastern Ry. Co.* (3); *Feay* v. *Barnwell* (4), and *May* v. *Sir Robert McAlpine & Sons (London), Ld.* (5).] Further, the sums awarded to the appellants under the Fatal Accidents Acts were inadequate. If the House considers that an injustice has been done it has jurisdiction to rectify it: *Flint* v. *Lovell* (6); *Evans* v. *Bartlam* (7); *Owen* v. *Sykes* (8).

Comyns Carr K.C., *Joshua Davies K.C.* and *G. P. Thomas* (for *H. E. Davies*, on war service) for the respondents. The words of s. 1, sub-s. 5, of the Act of 1934 are wholly inappropriate to secure that damages awarded under the Law Reform Act should not be taken into account in calculating damages under the Fatal Accidents Acts. "Derogation" is not an appropriate word to use in referring to the diminution of a sum of money. It is easier to assume that the draftsman of the Act used a tautologous expression ex abundanti cautela than that he used it to refer to a diminution of damages. There is no foundation for the suggestion that *Benham* v. *Gambling* (1) established that damages under the Act of 1934 do not cover loss of future earning power. In assessing damages under the Fatal Accidents Acts, there must be taken into account damages recoverable under the Act of 1934 which will benefit dependants: *Grand Trunk Railway Co. of Canada* v. *Jennings* (2); *Feay* v. *Barnwell* (3). No exception to the general rule is established by s. 1, sub-s. 5. As regards the amount of the damages awarded under the Fatal Accidents Acts, the judge acted on the right principles of law and his estimate was not erroneous.

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(1) [1937] A. C. 826, 862.
(2) [1941] A. C. 157.
(3) [1937] 2 K. B. 515; [1938] A. C. 606.
(4) [1938] 1 All E. R. 31, 35.
(5) (1938) 54 T. L. R. 850.
(6) [1935] 1 K. B. 354, 359, 360.
(7) [1937] A. C. 473, 480.
(8) [1936] 1 K. B. 192, 198.

Paull K.C. replied.

The House took time for consideration.

1942. April 27. LORD RUSSELL OF KILLOWEN. My Lords, the main point for our decision is short but important. It may be stated thus: Must damages recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934, be taken into account in assessing damages under the Fatal Accidents Acts, 1846 to 1908, in the case of dependants who will benefit from the damages under the Act of 1934? The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately.

It is rightly conceded that the general rule must apply unless some statutory exception to it prevents its application. There are two well-known instances in which such a statutory exception has been enacted. One is the case of life insurance, as to which the Fatal Accidents (Damages) Act, 1908, s. 1, enacts: "In assessing damages in any action whether com-"menced before or after the passing of this Act under the "Fatal Accidents Act, 1846, as amended by any subsequent "enactment, there shall not be taken into account any sum

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(1) [1941] A. C. 157.

(2) (1888) 13 App. Cas. 800.

(3) [1938] 1 All E. R. 31.

"paid or payable on the death of the deceased under any "contract of assurance or insurance whether made before or "after the passing of this Act." The other instance relates to pensions, as to which the Widows', Orphans' and Old Age Contributory Pensions Act, 1936 (re-enacting s. 22 of the Act of 1929), provides by s. 40 that: "In assessing damages in "any action under the Fatal Accidents Acts, 1846 to 1908, "whether commenced before or after the commencement of "this Act, there shall not be taken into account any widow's "pension, additional allowance or orphan's pension payable "under this Act." The appellants claim that a statutory exception to the rule in relation to damages recoverable under the Act of 1934 is to be found in s. 1, sub-s. 5, of that Act, which runs thus: "The rights conferred by this Act for the benefit "of the estates of deceased persons shall be in addition to and "not in derogation of any rights conferred on the dependants "of deceased persons by the Fatal Accidents Acts, 1846 to "1908." All that this subsection does, according to the language used, is to provide that the rights shall co-exist, but I can find no words which would justify me in holding that the sub-section purports to alter the measure of the damages recoverable for the benefit of a dependant under the Fatal Accidents Acts. The language of the sub-section falls far short of this, and its weakness for the purpose to which the appellants seek to apply it is emphasized by a comparison of the language used therein with the clear and unambiguous provisions of the two statutory exceptions to which I have referred and by the fact that the Act which enacts the earlier of the two exceptions is actually mentioned in the sub-section in question. It was sought to extract some special meaning from the dual phrase "shall be in addition to and not in derogation of." This, it was said, was not idly tautological, but intentionally cumulative, and the words "not in derogation of" involved a direction that there was to be no taking away or deduction from or diminution of the damages obtainable under the Fatal Accidents Acts. For myself, I can see no sufficient ground for reading this subtle hidden meaning into the subsection. I agree with the Court of Appeal that the words "and not in derogation of" merely emphasize what has been already said, that the rights conferred by one Act are additional to the rights conferred by the other Acts, and are to that extent tautological. It was suggested that a difficulty would arise if at the time of assessing the damages under the Fatal

Accidents Acts, no proceedings had been taken under the Act of 1934, and it was unknown whether any such proceedings would ever be taken. I see no real difficulty here. The authority assessing the damages could always take into account the possibility of such proceedings and make allowance accordingly. A difficult matter no doubt, and quite incapable of accurate valuation, but, as Lord Watson observed in delivering the judgment of the Judicial Committee in *Grand Trunk Ry. Co. of Canada* v. *Jennings* (1): "In some circum-"stances, that principle admits of easy application; but in "others, the extent of loss depends upon data which cannot "be ascertained with certainty, and must necessarily be "matter of estimate, and, it may be, partly of conjecture." I am of opinion that on the main point the appeal fails.

The appellants also claimed that the amounts awarded were insufficient in the cases of the two children of Mrs. Davies, and in the cases of Mrs. Williams and her three children. I entertain no doubt that your Lordships have full power to alter the amounts awarded if on consideration of all relevant facts you come to the conclusion that in any particular case an entirely erroneous estimate has been made. As regards the children I am unable to come to any such conclusion. As regards Mrs. Williams the case is different. I would award her the sum suggested by Luxmoore L.J., namely 750*l.*, and this sum meets, I understand, with the approval of all your Lordships. It remains to consider the question of the costs here and in the Court of Appeal. The appellants have failed in regard to the main point, but one appellant has succeeded here, and ought to have succeeded in the Court of Appeal, in regard to the award to herself, a matter the argument on which took up but a small portion of the time occupied in your Lordships' House. In these circumstances I suggest that substantial justice would be done if the appellants were ordered to pay one third of the respondent's costs of the appeal to this House and only three-quarters of the costs which they were ordered to pay by the order of the Court of Appeal. I move accordingly that the order of the Court of Appeal of February 12, 1941, be discharged, but only so far as it provides that the judgment of March 19, 1940, be affirmed and the appeal dismissed with costs, and that in lieu of such provision it be ordered that the said judgment be varied by inserting therein the sum of "500*l.*" in the place of the sum of "5*l.*" awarded

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(1) 13 App. Cas. 800, 803.

Lord Russell of Killowen.

to the plaintiff, Margaret Williams, and the sum of "975*l.*" in place of the sum of "480*l.*", that save as aforesaid the said judgment be affirmed, and that the plaintiffs, Doris Davies and Margaret Williams, be ordered to pay to the defendants or their solicitors three-quarters of the taxed costs of the appeal. The appeal to this House should succeed to that extent, but the appellants must pay one third of the respondent's costs in this House.

My Lords, I am authorized by my noble and learned friend LORD CLAUSON to say that he agrees with the opinion which I have just delivered.

LORD MACMILLAN. My Lords, this appeal raises for your Lordships' determination two questions, one of general importance, the other of importance only to the appellants. The question of general interest is whether, in assessing the damages payable under the Fatal Accidents Acts, 1846 to 1908, to any dependant of the deceased, there must be taken into account any benefit which that dependant may receive by participating in damages under the Law Reform (Miscellaneous Provisions) Act, 1934. The other and particular question is whether any of the sums awarded to the appellants by the trial judge and affirmed by the Court of Appeal are so inadequate as to call for revision.

It was common ground that, except where there is express statutory direction to the contrary, the damages to be awarded to a dependant of a deceased person under the Fatal Accidents Acts must take into account any pecuniary benefit accruing to that dependant in consequence of the death of the deceased. It is the net loss on balance which constitutes the measure of damages. Two cases were referred to in which the legislature has expressly introduced exceptions. By the Fatal Accidents (Damages) Act, 1908, s. 1, it is enacted that, in assessing damages under the principal Act, "there shall not be taken "into account any sum paid or payable on the death of the "deceased under any contract of assurance or insurance." The Widows', Orphans' and Old Age Contributory Pensions Act, 1936, s. 40, similarly provides that "there shall not be "taken into account any widows' pension, additional allowance "or orphans' pension payable under this Act." The appellants rely on s. 1, sub-s. 5, of the Law Reform Act, which they maintain to be similar in intention and effect and which reads as follows: "The rights conferred by this Act for the "benefit of the estates of deceased persons shall be in addition "to and not in derogation of any rights conferred on the "dependants of deceased persons by the Fatal Accidents Acts, "1846 to 1908 . . . ." On the interpretation of the provision which I have just quoted I find myself in agreement with the learned lords justices in the Court of Appeal and with all your Lordships. The rights conferred by the Law Reform Act for the benefit of the estates of deceased persons are the rights to maintain after the death of such deceased persons all causes of action vested in them. These rights are to be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts. This means, as I read the words, that on the death of a deceased person it shall be competent to maintain actions both under the Law Reform Act and under the Fatal Accidents Acts. The rights of action in the two cases are quite distinct and independent. Under the Law Reform Act the right of action is for the benefit of the deceased's estate; under the Fatal Accidents Acts the right of action is for the benefit of the deceased's dependants. But, inasmuch as the basis of both causes of action may be the same, namely, negligence of a third party which has caused the deceased's death, it was natural to provide that the rights of action should be without prejudice the one to the other. It is quite a different thing to read the provision as meaning that in assessing damages payable to dependants under the Fatal Accidents Acts no account is to be taken of any benefit which the dependants may indirectly obtain from an award under the Law Reform Act through participation in the deceased's estate. When the legislature intends such an exclusion it employs appropriate and quite precise language, as may be seen from the two instances I have quoted to which, as being in pari materia, it is legitimate to refer by way of contrast. It will be observed that in both these instances the benefit arising on the deceased's death is independent of the manner in which the deceased met his death. It was, therefore, reasonable to exclude such benefits from the computation of damages due in respect of negligence causing the deceased's death, but the damages due under the Law Reform Act and under the Fatal Accidents Acts are both awarded in respect of the same negligence, and it is appropriate that any benefit taken indirectly by a dependant by way of participation in an award under the Law Reform Act should be taken into account in estimating the damages awarded to that dependant under the Fatal Accidents Acts.

On the question of amount, your Lordships are properly reluctant to vary the awards of the trial judge in such cases as the present and do so only in very exceptional circumstances. I am, however, satisfied that in the case of the appellant, Mrs. Williams, the sum awarded to her under the Fatal Accidents Acts was quite inadequate. In this I agree with Luxmoore L.J., and I am in favour of adopting the figure which he proposed, namely 750*l.*, which, after taking into account the award of 250*l.* under the Law Reform Act, leaves a balance of 500*l.* payable to Mrs. Williams under the Fatal Accidents Acts. I see no justification for altering the awards of the trial judge in the case of any of the children of either of the deceased.

LORD WRIGHT. My Lords, the main question in these appeals is one of principle, whether the trial judge and the Court of Appeal were right in holding that the damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, should be brought into account in ascertaining the sum to be awarded to the appellant under the Fatal Accidents Acts. There is a further question which I shall consider later as to the sufficiency of the sums awarded by the judge under these Acts.

The general nature of the remedy under the Fatal Accidents Acts has often been explained. These Acts "provided a new "cause of action and did not merely regulate or enlarge an "old one," as Lord Sumner observed in *Admiralty Commissioners* v. *S.S. Amerika* (1). The claim is, in the words of Bowen L.J., in *The Vera Cruz* (*No.* 2) (2), for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages suffered not by himself, but by his family after his death. The Act of 1846, s. 2, provides that the action is to be for the benefit of the wife or other member of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death. The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution

(1) [1917] A. C. 38, 52.

(2) (1884) 9 P. D. 96, 101.

of the damages must be considered: *Grand Trunk Ry. Co. of Canada* v. *Jennings* (1). The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death. An early and striking statement of the principle is afforded by *Pym* v. *Great Northern Ry. Co.* (2), in the Exchequer Chamber, in which the direction of the jury, given by Lord Campbell C.J., in *Hicks* v. *Newport, Abergavenny and Hereford Ry. Co.* (3) was approved. Lord Campbell there directed the jury that from the aggregate amount of compensation which they would be otherwise prepared to give they should make a deduction in respect of (e.g.) an insurance of 1000*l.* against railway accidents. That was a benefit which went to reduce the pecuniary loss to the plaintiff consequent on the death. In the *Grand Trunk* case (1) other illustrations are given of a general character, but the principle is too well known to need further instances. A relaxation of the rule was introduced in an Act passed in 1908, entitled the Fatal Accidents (Damages) Act, to amend the law with respect to the assessment of damages under the Fatal Accidents Acts. It provided by s. 1, that, in assessing damages in such cases, there should not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance. The same principle was extended to pensions under the Widows', Orphans' and Old Age Contributory Pensions Acts, 1925 and 1935, so that these pensions have no longer to be taken into account in assessing damages under the Acts.

The question is whether the general principle of bringing into account other benefits accruing to a plaintiff on the death applies to sums awarded under the Law Reform Act. The judge acted on that principle. Thus, he awarded to the appellant, Margaret Williams, 5*l.* and no more under the Fatal Accidents Acts, because he awarded to her (apart from funeral expenses) 250*l.* under the Law Reform Act. It is clear that, but for the deduction of that sum, he would have awarded 255*l.* under the Fatal Accidents Acts. The two claims by the appellant, Mrs. Williams, were indeed separate and distinct. In the claim under the Law Reform Act she

(1) 13 App. Cas. 800, 804.
(2) (1863) 4 B. & S. 396.
(3) (1857) 4 B. & S. 403 (*n*).

sued as administratrix on behalf of her late husband's estate, but in the circumstances whatever was awarded under that Act would go to her on administration as widow for her own benefit since the estate was under 1000*l.* in value. There were, it seems, no debts or legacies or death duties or expenses (apart from funeral expenses, which are now dealt with separately under the Law Reform Act) of sufficient importance to be considered. Thus, the 250*l.* accrued to her by reason of the death, though it came to her by a different title and under a different statute from any sum which she recovered under the Fatal Accidents Acts. The claims of the children under these Acts are not affected.

The general principle that the right of the individual defendant under these Acts is for damages to be assessed on a balance of loss and gain, which is established by long-standing authority, would prima facie seem to apply to this case. But Mr. Paull, for the appellants, has strenuously contested this. I am of opinion that the decisions appealed from are in these cases on this point correct. It is true that the damages under the Law Reform Act would not necessarily in all cases come to the widow. The deceased man might have willed away from her in whole or in part his estate, whatever it was, and thereby willed away these damages which are awarded to the administratrix as representing the estate. Or the estate might be insolvent, so that the whole of the damages were eaten up by the liabilities. These and many other contingencies, some of which were instanced in the *Grand Trunk* case (1), might have to be considered and estimated, particularly when the action under the Law Reform Act was not brought until after the action under the Fatal Accidents Acts had been decided, so that it might have been quite hypothetical what sum, if any, should be set off against the damages under the Fatal Accidents Acts. As Lord Watson pointed out in the *Grand Trunk* case (1), the estimation of the actual extent of the pecuniary loss of the dependant may depend on data which cannot be ascertained with certainty and must be matter of estimate or even partly of conjecture. This may be true of any contingent or doubtful claim which the estate may have, including a claim under the Law Reform Act which would need to be considered in order to ascertain the amount, if any, coming to the widow out of the estate. These difficulties, however, do not arise in a case so simple as this.

(1) 13 App. Cas. 800, 804.

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The court in one trial can decide all relevant matters, but Mr. Paull's strong point has depended on an express provision in the Law Reform Act, s. 1, sub-s. 5, the material words of which are: "The rights conferred by this Act for the benefit "of the estates of deceased persons shall be in addition to and "not in derogation of any rights conferred on the dependants "of deceased persons by the Fatal Accidents Acts, 1846 to "1908." His contentions were that these words mean that any sums recovered under the Law Reform Act were not to be taken into account in assessing the damages under the Fatal Accidents Acts, that the causes of action are distinct and independent, and the word "rights" in s. 1, sub-s. 5, of the Act of 1934, includes all rights, including the right to recover a sum of damages, and that this right is not to be derogated from or diminished by reason of the new right of action or damages recovered under it. But to accept these contentions would, in my opinion, involve changing the whole basis of the Fatal Accidents Acts which give a claim for damages to be assessed on the balance of profit and loss and to be proportioned to the injury resulting from the death to the individual. The injury suffered by the individual from the death cannot be computed without reference to the benefit also accruing from the death to the same individual from whatever source.

The position under the Fatal Accidents Acts is too well and too long established to be changed without clear words. I think that s. 1, sub-s. 5, of the Act of 1934, is dealing with the cause of action under the Fatal Accidents Acts, not with the assessment of damages. If the latter had been intended, different words would have been used, as they were in the Act of 1908, to which I have already referred. It was there intended to provide that sums recovered under policies of insurance were not to be taken into account, and the language used in s. 1 was appropriate. "In assessing damages . . . . " under the Fatal Accidents Act, 1846, as amended by any "subsequent enactment, there shall not be taken into account "any sum paid or payable on the death of the deceased "under any contract of assurance or insurance." It is clear that this clause precisely covers what Mr. Paull has contended to be the meaning of the very different language of s. 1, sub-s. 5, of the Law Reform Act. I do not treat the difference in wording as conclusive, nor do I think that a parliamentary draftsman necessarily always uses the same

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set of words to express the same idea, but the contrast is not without significance and confirms the conclusion that the language of s. 1, sub-s. 5, has some other intention than a change in the method of calculating the damages. I do not think it helpful to speculate what is the precise object of the language used. It may, perhaps, be to exclude any idea that the Law Reform Act, by giving the executor or administrator an action under it, prevented the same person from also suing as executor or administrator under the Fatal Accidents Acts on his personal behalf for the same negligence or breach of duty. The two causes of action are, however, independent, though a duplication of damages is to be avoided. In my opinion, this cannot arise if the ordinary rule in assessing damages under the Fatal Accidents Acts is observed.

That this duplication should be avoided was the view both of Lord Atkin and of myself, and, I think, also of Lord Roche in *Rose* v. *Ford* (1). That case was peculiar in respect of the award of damages. The judge awarded 300*l.* to the deceased girl's father under the Fatal Accidents Acts and 500*l.* to the father as administrator under the Law Reform Act for the deceased girl's personal injuries, including loss of her leg. The 500*l.* was reduced by the Court of Appeal to 22*l.* This sum was not awarded for loss of expectation of life, but in this House damages under that head were given in the sum of 1000*l.*, which was a figure provisionally fixed by the Court of Appeal and, as it was not questioned by the parties as a figure, was accepted from them by the House. The House was not asked to consider the propriety of any of these figures, or any question of their possibly overlapping or of their being set off one against the other. Lord Atkin, however, expressed the view that overlapping would be avoided by the ordinary method of setting off gains against losses where the facts so require under the Fatal Accidents Acts. That, I think, is right. I also expressed the view that duplication was to be avoided, notwithstanding the words of s. 1, sub-s. 5, but, having in mind that the damages agreed under the Law Reform Act were so agreed subsequently to and independently of the damages awarded under the Fatal Accidents Acts, I assumed that there was no duplication in that case. I may, however, seem to have thought that the damages under the Law Reform Act might be liable to abatement if damages came to the same beneficiary under the Fatal Accidents Acts. I do not now see how this could happen because in theory the former damages must be taken into account in assessing the latter. In *Rose* v. *Ford* (1) the question did not arise and was not argued.

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(1) [1937] A. C. 826.

There remain to be considered the appeals of the widows and children on the issue of fact claiming that the sums awarded by Lewis J. were wholly inadequate and should be increased. I think that all these appeals fail, except one, that is, the appeal of the appellant, Mrs. Williams. As to that I agree with the dissenting judgment in the Court of Appeal of Luxmoore L.J. that the award is wholly inadequate, and, like him, I would increase it to 750*l*. An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases. There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case: *Mechanical and General Inventions Co., Ld.* v. *Austin* (2). Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by

(1) [1937] A. C. 826.

(2) [1935] A. C. 346.

Greer L.J. in *Flint* v. *Lovell* (1). In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency. In the case of the appellant, Mrs. Williams, I think the judge has awarded a wholly inadequate sum. There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt. It seems as if the award of 250*l.* was based on something like three-and-a-half years' purchase of the basic figure. This appears to me to be out of all proportion and much too low. I should, after allowing for all reasonably probable chances of the diminution of the loss, accept the figure taken by Luxmoore L.J. of 750*l.* as being not unfair, and I should increase the damages recoverable by the appellant, Mrs. Williams, accordingly. In that respect I should allow her appeal. Otherwise the appeal fails in her case, and it fails entirely in the case of the other appellant. I agree with the motion proposed by the noble and learned Lord on the Woolsack.

LORD PORTER. My Lords, the points taken on behalf of the appellants differ widely in the importance of their character. They were two in number: (I.) that damages recovered under the Law Reform (Miscellaneous Provisions) Act, 1934, should not be taken into account in calculating the damages recoverable under Lord Campbell's Act even though the same persons benefited as a result of sums received under both Acts; (2.) that the sums awarded under Lord Campbell's Act to one of the claimants, Mrs. Williams, and to the children of both claimants were inadequate. The decision of the first point will affect a large number of claims and determine the principle to be applied in all cases where the same persons stand to benefit under both Acts. The second is only of importance in this individual case and depends solely on its particular circumstances.

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(1) [1935] 1 K. B. 354, 360.

As to (1.), it is common ground that, apart from the provisions of s. 1, sub-s. 5, of the Law Reform Act, any recovery under that Act which benefits a person having a claim under Lord Campbell's Act must be taken into consideration in assessing the amount recoverable on behalf of that person under the latter Act. Under Lord Campbell's Act the question for decision is what damage is proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action is brought. The wording itself is sufficient to show that each individual must be considered separately, and *Pym* v. *Great Northern Railway Co.* (1) so decides. In calculating the damage proportioned to the injury it is the accepted view that all factors, benefits as well as injuries, must be taken into account so as to ascertain on a balance of losses and gains what (if any) compensation is to be awarded. *Pym's Case* (1) illustrates this proposition. Accordingly, up till 1908 it was necessary to have regard to any insurance effected by the deceased on his life. If the subject-matter of that insurance was accidental death and the deceased man was accidentally killed, the full sum recoverable, being a gain resulting wholly from the death, was generally regarded as a gain which, to the extent to which any dependant benefited from it, would diminish the sum to be awarded to that dependant. But not every sum paid under an insurance policy was so regarded. Life insurance, inasmuch as its receipt was not solely brought about by the death but was merely accelerated by it, was, it is true, to be taken into account, but only to the extent of the benefit arising from its acceleration. In *Grand Trunk Railway Co. of Canada* v. *Jennings*, Lord Watson said (2): "Their Lord-"ships are of opinion that all circumstances which, though "insufficient to exclude a statutory claim, may be legitimately

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(1) 4 B. & S. 396.

(2) 13 App. Cas. 800, 804.

"pleaded in diminution of it ought to be submitted to the "jury. . . . It appears to their Lordships that money provisions made by a husband for the maintenance of his "widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent "(if any) to which these ought to be imputed in reduction "of damages must depend upon the nature of the provision "and the position and means of the deceased." Up to 1908 these observations were applicable to every such provision. In that year, however, was passed the Fatal Accidents (Damages) Act which provided that, in assessing damages under the Fatal Accidents Act, 1846, there should not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance. Apart from such sums, however, no change has been made in the matters to be taken into consideration in calculating the damages to be awarded under the Act of 1846, except that a similar provision in similar terms has been enacted by s. 40 of the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, with the result that in assessing damages under Lord Campbell's Act widows' and orphans' pensions are not to be taken into account. Both these Acts contain special provisions whereby certain sums accruing to dependants by reason of the death of a relative are to be disregarded in calculating the amount to be awarded to them under Lord Campbell's Act as a consequence of that death. In each the language is clear and precise. It is argued that the same result is attained, though in less exact language, in respect of sums recovered or recoverable under the Law Reform (Miscellaneous Provisions) Act of 1934. The wording relied on is that of s. 1, sub-s. 5: "The rights conferred by this "Act for the benefit of the estates of deceased persons shall "be in addition to and not in derogation of any rights conferred "on the dependants of deceased persons by the Fatal Accidents "Acts, 1846 to 1908."

It was contended that the better interpretation of this wording was not only that the right of recovering damages given by Lord Campbell's Act was not taken from the dependants concerned, but also that any sum recoverable under the Act of 1934 should be disregarded in calculating the amount to be awarded under the earlier Act. If this was the intention of the draftsman of the Act he might have followed the plain language of the Fatal Accidents Act, 1908, and the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, but he was not obliged to do so, and the construction of the sub-section must depend on its own wording. Even, however, regarding the language as it stands, it appears to me unsuitable to bring about so drastic a change in the law as is claimed.

Both Lord Campbell's Act and the Law Reform Act deal with the same matter. Both provide means whereby compensation may be recovered on death against a tortious killer, compensation passing, in the one case, to certain specified dependants, and, in the other, to the estate of the deceased person. Without the provisions of s. 1, sub-s. 5, of the later Act it might well be thought that the right of recovery given by that Act would put an end to the particular rights given in respect of the same death by Lord Campbell's Act. The provision is desirable and understandable as a safeguard against such a construction, and it is unnecessary to impart to it the more comprehensive effect claimed. But, it is said, if this be all that is comprehended, why use the duplicate phrase "shall be in addition to *and* not in derogation of"? It is true that, in construing an Act of Parliament, weight should be given to all the words used, and, if I thought that insufficient regard was being paid to the language by adhering to the narrower meaning, I should be impressed by the argument, but the phraseology used seems to me natural enough if its object be to ensure that the rights given by Lord Campbell's Act shall not be taken away altogether but shall be additional to the rights given by the Act of 1934. On the other hand, it seems ill-adapted to secure that the quantum of damages to be given shall not be affected. It is, perhaps, worthy of notice that in sub-s. 5 it is the rights, not the damages, which are to be additional to and not in derogation of the rights under Lord Campbell's Act. If the quantum of damages recoverable under Lord Campbell's Act was to be unaffected, one would have expected some such wording as: "The damages recoverable under this Act shall be in "addition to and not in diminution of any damages recoverable "by dependants of deceased persons under the Fatal Accidents "Acts, 1846 to 1908." The words "rights" and "in derogation of" are, I think, inappropriate to effect the purpose suggested. Those actually used are, to my mind, far from being explicit enough to bring about the result contended for.

But various objections and difficulties were pressed on your Lordships as leading to the conclusion that, though the wording might have been clearer, yet it was clear enough to show that compensation under Lord Campbell's Act should be recovered in full, whatever might be the additional sums awarded under the Law Reform (Miscellaneous Provisions) Act of 1934. It was said, in the first place, that the personal representatives of the deceased man might be different from any of the persons entitled to compensation under Lord Campbell's Act and might be unwilling to bring an action. So far there is little difficulty, because in such a case the persons entitled are in no worse position than any person entitled under a will in a case where executors refuse to sue to get in an actual or supposed debt. But, it was added, suppose in that or any other case an action is brought under Lord Campbell's Act and it is not clear whether a subsequent action under the Law Reform Act will or will not be brought. Plainly in such a case any damages awarded under Lord Campbell's Act cannot subsequently be deducted from those obtained by the same persons under the Law Reform Act. If any deduction is to be made, it must be effected by taking away an appropriate sum from the damages recoverable in the action under Lord Campbell's Act. The principle to be adopted is not difficult to state, but the calculation of what is an appropriate sum is far from easy. The answer is, I think, that in any such case the court must, if necessary, make the best estimate it can of the benefit which the parties entitled under Lord Campbell's Act are likely to obtain under the Act of 1934. As Lord Watson said in the *Grand Trunk Ry.* case (1): "in others" (i.e. other cases) "the extent of loss "depends upon data which cannot be ascertained with "certainty, and must necessarily be matter of estimate and, "it may be, partly of conjecture." Before 1908 a case might have arisen where there existed on behalf of the dead man's estate a claim under a policy of life or accident insurance which was disputed. In that event the court in assessing the measure of damages under Lord Campbell's Act, would have had to calculate as best it could the worth of the claim to each of the parties interested. The difficulty may be greater in a case where for any reason it is hard to discover among whom and in what proportions the sum so recovered is divisible, but it is not insuperable and it is not new. Finally, it was said that in the case of a recovery under Lord Campbell's

(1) 13 App. Cas. 800, 803.

Act the court could, by reason of the provisions of O. XII., r. 14, sub-r. 9, together with sub-rr. 2 and 3 of the same rule, keep control of the sum or sums recovered and prevent them from being wasted by the recipients, whereas in the case of a widow, at any rate, it had no such power in the case of damages obtained under the Law Reform Act. This, no doubt, is true, but is hardly a valid reason for altering the interpretation of the section in question.

In my view, the appellant fails and I should reach the same conclusion without assistance from views expressed in previous cases, but this House is not left without some indication of the impressions formed in at least one previous case of the answer to the problem presented to it. Your Lordships were told that, following the example set in *Feay* v. *Barnwell* (1), the practice has sprung up of deducting sums which have been recovered under the Law Reform Act and which go to the benefit of persons who are entitled to receive compensation under Lord Campbell's Act from such compensation. Singleton J's decision in that case is, as he states, founded on the principles which he believed to be deducible from the opinions expressed by some members at least of your Lordship's House in *Rose* v. *Ford* (2). In the latter case Lord Atkin said (3): "I should add that I see no difficulty as to "the alleged duplication of damages under the Act of 1934 "and the Fatal Accidents Acts. If those who benefit under "the last mentioned Acts also benefit under the will or "intestacy of the deceased personally, their damages under "those Acts will be affected." Lord Wright dealt with the same matter in the words (4): "I think that in practice no "duplication of damage need occur. I think the jury would "be properly directed to take into account either that they "were at the same time giving damages under Lord Campbell's "Act as they did here, or that such damages had been or might "be given . . . . one of the fruits of continued life is generally "provision for dependants. If that provision is made good "by awards under the Fatal Accidents Acts, the loss consequent "on the shortening of life may be deemed to be pro tanto "reduced." It is true that, except incidentally by way of argument, this question of duplication did not arise in that case, and, indeed, it is clear that the noble and learned lord, Lord Wright, was merely suggesting methods by which

(1) [1938] 1 All E. R. 31, 35.

(2) [1937] A. C. 826.

(3) Ibid. 835.

(4) [1937] A. C. 826, 852.

duplication might be avoided and not considering exactly how it could be done, but the statements, so far as they go, are against the appellants and in conformity with the view which I have formed.

It was urged, however, that one must read these views in the light of Lord Roche's speech, who said (1): "I have "nothing to say as to the award of 300*l.* under Lord Campbell's "Act save that this was the proper place to deal with the "deceased's future earning power cut off by death, and that "accordingly there was no clashing or overlapping as between "the two causes of action." This, it is argued, expresses the true view. The widow and dependants must not get compensation for the future earning power of the husband twice over, once under Lord Campbell's Act and once under the Law Reform Act. That would be duplication of damages, but, it is said, no such overlapping occurs where damages for loss of expectation of life are given. It is, it is contended, plain from the decision in *Benham* v. *Gambling* (2), that such damages represent only the loss of a happy life and do not include loss of future earning power, and that one who recovers compensation under Lord Campbell's Act and also a share of such damages is, at any rate, not getting the same thing twice over. Whatever may be the truth of this argument—and I say nothing as to its merits either way—it leaves untouched, as I think, the true reason for deducting damages under the Law Reform Act from those recovered under Lord Campbell's Act, namely, that the latter are given to compensate the recipient on a balance of gains and losses for the injury sustained by the death. To discover this balance gains as well as losses must be taken into account, whether there be duplication of damages or not. At best, the argument is only a method of explaining the language used in *Rose* v. *Ford* (1) and has little real bearing on the point in issue.

My Lords, the other question is whether this House should increase the sums awarded under Lord Campbell's Act in the case of Mrs. Williams and the children of both widows. These amounts must be considered separately—see *Pym's Case* (3) and *Avery* v. *London & North Eastern Ry. Co.* (4). The principle on which a change will be made is, I think, accurately set out in *Owen* v. *Sykes* (5), where it is stated that

(1) [1937] A. C. 826, 862.
(2) [1941] A. C. 157.
(3) 4 B. & S. 396.
(4) [1938] A. C. 606.
(5) [1936] 1 K. B. 192.

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the finding of the trial judge as to the amount of damages will not be reviewed unless the appellate court is satisfied that the trial judge acted on a wrong principle of law or the amount of damages is such (in that case it was "so high") as to make it an entirely erroneous estimate of the damages to which the claimants were entitled. Acting on this principle, so far as the children are concerned, I cannot find any error in law, and the sums awarded are not, in my view, such as to show an entirely erroneous estimate of the damage. So far, however, as Mrs. Williams is concerned, the damages do seem to me unreasonably small. The learned judge has not given any reasons for his decision nor explained the discrepancy between the sum given to Mrs. Davies and that given to Mrs. Williams. I do not know whether I should myself have awarded exactly the sum suggested by Luxmoore L.J., but I know it would have been very greatly in excess of that given by the learned judge, and I am not dissatisfied with the sum of 750*l.* suggested by the lord justice. To that extent I would allow the appeal.

Appeal allowed in part.

Solicitors for appellants: *Russell Jones & Co., for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *William A. Crump & Son, for A. J. Prosser, Cardiff.*

F. H. C.

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DUNCAN AND ANOTHER . . . . APPELLANTS;

AND

CAMMELL, LAIRD AND COMPANY, LIMITED . . . . RESPONDENTS.

Discovery—Affidavit of documents—Objection to production of documents—Disclosure injurious to public interest—Affidavit of Minister of Crown—Refusal to direct production of documents to court.

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* *Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, LORD PORTER and LORD CLAUSON.

A court of law should uphold an objection taken by a public department, called on to produce documents in a suit between private citizens, if on grounds of public policy they ought not to be produced. Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. The test may be found to be satisfied either (*a*) by having regard to the contents of the particular document, or (*b*) by the fact that the document belongs to a class which, on grounds of public interest, must as such be withheld from production. It is essential that the decision to object should be taken by the minister who is the political head of the department concerned and that he should have seen and considered the contents of the documents and himself formed the view that on grounds of public interest they ought not to be produced. If the question arises before trial the objection would ordinarily be taken by affidavit of the minister. If it arises on subpœna the objection may in the first instance be conveyed to the court by an official of the department, who produces a certificate signed by the minister stating what is necessary, but if the court is not satisfied it can request the minister's personal attendance.

An objection validly taken to production on the ground that it would be injurious to the public interest is conclusive. The mere fact that the minister or the department does not wish the documents to be produced is not an adequate justification for objecting to their production. Production should only be withheld when the public interest would otherwise be damnified, as where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. In such a case the court should not require to see the document, for the purpose of ascertaining whether disclosure would be injurious to the public interest.

When the Crown is a party to a suit, discovery of documents cannot be demanded by the other party as of right, although in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made.

Earl v. *Vass* (1822) 1 Shaw's App. 229 followed.

Statement in *Ankin* v. *London & North Eastern Ry. Co.* [1930] 1 K. B. 527, 533, incorrect.

Robinson v. *State of South Australia* (No. 2) [1931] A. C. 704 dissented from.

Decision of the Court of Appeal [1941] 1 K. B. 640 affirmed.

APPEAL from the Court of Appeal.

The facts, as stated by VISCOUNT SIMON L.C., were as follows: On June 1, 1939, the submarine, *Thetis*, which had been built by the respondents under contract with the Admiralty, was undergoing her submergence tests in Liverpool Bay, and, while engaged in the operation of a trial dive, sank to the bottom owing to the flooding of her two foremost

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compartments and failed to return to the surface, with the result that all who were in her, except four survivors, were overwhelmed. Ninety-nine men lost their lives. A large number of actions were instituted by those representing, or dependent on, some of the deceased, against the respondents and three other persons, claiming damages for negligence. All of these actions, except two, were stayed until after the trial of two test actions, which were consolidated, the plaintiffs in those two test actions being now the appellants. The respondents in their affidavit of documents objected to produce a number of documents listed under para. B of the second part of the first schedule for the reason which they set out in their affidavit as follows: " . . . . because they have "been acquired and are held by them or are copies of documents "which came into their custody in their capacity of contractors "and agents for the Lords Commissioners of the Admiralty "and subject to the directions of the First Lord of the "Admiralty and not otherwise, and the attention of the First "Lord having been drawn to the nature and contents of the "said documents the Treasury Solicitor has by his letter to "the London agents of their solicitors dated August 13, "1940 . . . . directed the defendant company not to produce "the said documents and copies and to object to production "thereof in these actions except under the order of this "honourable court on the ground of Crown privilege." The letter from the Treasury Solicitor therein referred to contained the following passage: "The question of the production of "the documents has been considered by Mr. Alexander, the "First Lord of the Admiralty, and I am instructed to inform "you that Crown privilege is claimed for all those in your "list numbered 1–16 other than those numbered 4, 7, and 8, "and with these three exceptions, the documents must, "accordingly, not be produced. I assume that you will "produce this letter to the plaintiffs' solicitors, and if necessary "to the master, and if it is not accepted as sufficient to found "a claim for privilege, I will obtain an affidavit from Mr. "Alexander making the claim formally." On January 29, 1941, Mr. Alexander, as First Lord of the Admiralty, swore an affidavit referring to the documents above referred to and stating: "All the said documents were considered by me "with the assistance of my technical advisers and I formed "the opinion that it would be injurious to the public interest "that any of the said documents should be disclosed to any

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"person. I accordingly instructed the Treasury Solicitor to write on behalf of the Lords Commissioners to the solicitors to the said defendants not to disclose the documents set out in the said list or their contents to the plaintiffs or either of them or to anyone on their behalf nor produce them for inspection in this action and to require them to claim privilege for the documents on the ground that it would be injurious to the public interest that the same should be disclosed or produced for inspection . . . . On the above grounds I object on behalf of the Lords Commissioners to the said documents or any of them or their contents being disclosed or inspected by the plaintiffs or either of them or by anyone on their behalf in this action." The documents, to the production of which objection was thus taken, included (either in original or as a copy) the contract for the hull and machinery of the *Thetis*, letters written before the disaster relating to the vessel's trim, reports as to the condition of the *Thetis* when raised, a large number of plans and specifications relating to various parts of the vessel, and a notebook of a foreman painter employed by the respondents. The appellants took out a summons, which came before Master Horridge, calling on the respondents to give inspection of the documents. The master refused to order inspection and his decision was confirmed by Hilbery J. sitting in chambers. In the Court of Appeal MacKinnon, Goddard, and du Parcq L.JJ. unanimously affirmed the judge's order, but gave the appellants leave to appeal to the House of Lords.

Wallington K.C. and *Holroyd Pearce* (for *F. D. L. McIntyre*, on war service) for the appellants. The documents in question should be produced. Some of them were produced before the tribunal of inquiry into the loss of the *Thetis* presided over by Bucknill J. and were referred to in his report (Cmd. 6190 of 1940), and once a document has been made public it can never be the subject of an objection to produce it in an action on the ground that it should not be made public. The wide diversity in the nature of the documents in regard to the production of which the question of public policy may arise is such that clearly injustice would be done if there were a universal rule that the opinion of an officer of State was final. Sometimes it may be doubtful whether a document contains matter which in the public interest should not be disclosed and the judge should determine the point by seeing the document. In other cases the character of the document would be so clear that there would be no need to examine it, but, unless the claim of privilege can be investigated, injustice may be done to the individual without necessity for it from the point of view of the protection of the State. The number of documents the disclosure of which would involve danger to the State is relatively small, and the documents in question in the present case do not on the face of them belong to a class the disclosure of which would prejudice the public interest. On the other hand, judges can be trusted properly to protect the interests of the State. These questions must either be taken entirely out of the hands of the court or left for the decision of the court. The power of decision has been given to the judges and that power necessarily imports a power of inquiry. The court can examine the document privately and in any order made can define the limits of its production. The court can also call in assistance from the department concerned, if necessary privately. In the present case that course could not be open to objection since the Crown is not a party to the action. If it is objected that the private examination of the documents in question by the court might involve the court communicating with one party to the exclusion of the other, it is obviously better for the litigant that there should be discussions behind his back ex parte than that the bare word of the Crown officials should automatically prevail. The administration of justice is part of the public welfare. In the matter of the disclosure of documents much may be left to officials who are not at the head of their department and they may make up their minds that a document should not be produced on grounds which would not appeal to the judge. [They referred to *Home* v. *Bentinck* (1); *Smith* v. *East India Co.* (2); *Beatson* v. *Skene* (3); *H.M.S. Bellerophon* (4); *Hughes* v. *Vargas* (5); *Hennessy* v. *Wright* (6); *Spigelmann* v. *Hocker* (7); *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co., Ld.* (8); *Asiatic Petroleum Co., Ld.* v. *Anglo-Persian Oil Co., Ld.* (9); *Ankin* v. *London & North Eastern Ry. Co.* (10); *Robinson* v. *State of South Australia* [*No.* 2] (11); *Dickson* v.

(1) (1820) 2 Brod. & B. 130, 160.
(2) (1841) 1 Ph. 50.
(3) (1860) 5 H. & N. 838.
(4) (1874) 44 L. J. Adm. 5, 6.
(5) (1893) 9 R. 661.
(6) (1888) 21 Q. B. D. 509.
(7) (1932) 50 T. L. R. 87, 88.
(8) 1909 S. C. 335.
(9) [1916] 1 K. B. 822, 830.
(10) [1930] 1 K. B. 527, 532.
(11) [1931] A. C. 704.

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Earl of Wilton (1); *Kain* v. *Farrer* (2); *Wadeer* v. *East India Co.* (3).]

VISCOUNT SIMON L.C. The House requires no assistance from counsel for the respondents on the question whether the decision of the Court of Appeal should be sustained. It only asks whether there are any additional authorities to which they wish to refer.

Sellers K.C. and *R. M. H. Everett* for the respondents referred to *Adam* v. *Ward* (4) and *Chatterton* v. *Secretary of State for India* (5).

The House took time for consideration.

1942. April 27. VISCOUNT SIMON L.C. My Lords, the question to be determined in this appeal is as to the circumstances in which it may be validly claimed on behalf of the Crown that documents, the production of which is demanded by regular process in a civil action, should not be produced on the ground that it would be contrary to the public interest to produce them, and as to the proper procedure to be followed if this claim is to be made good. This question is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This material one party, at least, to the litigation may desire in his own interest to make available, and without it, in some cases, equal justice may be prejudiced. The question may arise, as in the present instance, in an action between private parties, but it may also arise in a case where the Crown itself, or the Crown's representative, is a party to the suit, and declines to produce a document or objects to the production of a document by the other side. In framing my opinion, I have had the advantage of consultation with, and contribution from, the six noble and learned Lords who sat with me at the hearing of the appeal, and while what I am about to say is the expression of my own view, I have reason to think that it also expresses the judgment of my colleagues.

It was urged before us that, whatever the true principles on which production of documents should be refused on the ground of public interest, some of these documents could not be validly withheld because they had already been produced before the tribunal of inquiry into the loss of the *Thetis*, over which Bucknill J. presided, and because some reference was made to them in his Report (Cmd. 6190 of 1940). I am not convinced that in all cases a claim, validly made in other respects, to withhold documents in connection with a pending action on the ground of public policy, is defeated by the circumstance that they have been given a limited circulation at such an inquiry, for special precautions may have been taken to avoid public injury and some portion of the tribunal's sittings may have been secret. Moreover, in point of fact, Bucknill J. does not set out these documents in extenso, and there must be other entries in them which have not been reproduced. The appeal should be determined without being affected by this special circumstance.

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(1) [1859] 1 F. & F. 419.

(2) (1877) 37 L. T. 469.

(3) (1856) 8 De G. M. & G. 182, 189.

(4) [1917] A. C. 309, 344.

(5) [1895] 2 Q. B. 189, 195.

We have been referred to a large number of reported cases dealing with the claim to withhold documents on the ground that their production would be injurious to the public interest, and some of these I must examine. The argument before us proceeded on the assumption that there was no recorded decision of this House on the subject. This, however, is not so. My noble and learned friend Lord Thankerton has called my attention to a decision, pronounced by Lord Eldon L.C. in this House in 1822, which is very much in point, *Earl* v. *Vass* (1). The pursuer, Vass, had been a paymaster in the Berwickshire Regiment of North British Militia, and the Earl of Home, who was defender, was colonel of the regiment. Vass was hoping to be appointed comptroller of customs at the port of Grangemouth, and Lord Home, in answer to a letter from the collector of customs at that port, had made, as Vass alleged, an adverse report as to Vass's conduct when with the regiment, which, in turn, had given rise to correspondence between the Board of Customs, the Lords of the Treasury, and Lord Home. Vass was suing Lord Home for damages for defamation and, after pleadings were closed, the Lord Ordinary granted to Vass "a diligence for recovery of the writings "founded on by him in the condescendence." Vass, therefore, summoned the Commissioners of Customs and their secretary to produce the documents which the condescendence alleged to be in their hands, and the commissioners objected "that they "were neither bound nor entitled to produce the papers called "for, as they had come into their hands on behalf of the "public, and in the course of an investigation as to the fitness

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(1) (1822) 1 Shaw's App. 229.

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"of Vass to hold an official and confidential situation." The Lord Ordinary repelled this objection, and he was confirmed by the Inner House of the Court of Session. The Commissioners of Customs appealed to the House of Lords. No case was lodged on behalf of Vass, and this House ordered and adjudged that the interlocutors complained of be reversed. Lord Eldon described the question raised as being (1) " whether "the appellants can be compelled to produce in evidence in a "court of law, in an action depending between third parties, "and in which they have no interest, officially or otherwise, "the documents coming to their hands in the discharge of their "official duty, and remaining in their custody? " In the course of his judgment, the Lord Chancellor said (1) : " I apprehend, "in all the cases in which it has been held, upon the principles "of public policy, that you shall not be compellable to give "evidence of, or produce such instruments—that is, wherever "it is held you are not, on grounds of public policy, to produce "them—you cannot produce them, and that it is the duty of "the judge to say, you shall not produce them. This question "is not, whether they can be permitted to produce them, "but whether they can be compelled to produce them." And, after giving a detailed account of the pleadings, the Lord Chancellor reached his decision thus (2): "Your "Lordships will see that this is a case in which it becomes "necessary, in order, if any justice whatever can be done, "that not only the correspondence which is in the hands "of the Board of Customs, but also all that has passed with the "Secretary at War—and not only all that has passed with the "Secretary at War, but all that has passed with the officers of "the regiment—and not only all that has passed with the "officers of the regiment, but all that has passed with respect "to the Treasury, must all be set out. The Board of Customs "are to be called upon to produce the documents they have "in their hands relative to this transaction, going through so "many public officers, inquiring into the conduct of an "individual under all the circumstances in which Mr. Vass "stood. The question is, whether, upon the grounds stated, the "Board of Customs, as the servants of the Crown, having these "papers in their hands, are at liberty to produce them ? So I "must put the question. If they were at liberty to produce "them, they might be compellable to produce them. There are "many cases that bear upon this, which it is not necessary to

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(1) 1 Shaw's App. 230. (2) Ibid. 236, 237.

"go through. In the case of an information in the Court of "Exchequer, where a man gives information as to smuggled "goods, they will not allow you to ask who gave the information. So, as to cases of high treason, they will not allow a "party to tell who gave the information. They will not allow "it; and in a late case which I have in my hand, this matter "was very much discussed, as far as the War Office was concerned, and which came very near to this. It is the case of "*Home* v. *Lord William Bentinck* (1) in the Exchequer Chamber "in 1820, which refers to another case in the King's Bench, in "Lord Ellenborough's time. There the principle is laid down "—not that the right is, as here discussed, to withhold a document, because it is the property of the individual who has it— "but because it is against public policy that you should be "compelled to produce instruments and papers, which if persons are compelled to produce, it must shut out the possibility "of the public receiving any information as to a person's "fitness to be appointed to an office. Upon these grounds it has "been held, in this part of the country, we can enforce no such "direction. I took the liberty to communicate with the Lord "Chief Justice upon this case." [The Lord Chief Justice referred to was Abbott C.J.] "I showed him the papers; and "he stated, without the least hesitation, that he would not have "permitted any such production as is here called for, upon the "grounds I have stated. . . . Upon the whole, it does appear "to me that it would be a very dangerous thing indeed, if this "were permitted; and therefore it does seem to me that this "judgment ought to be reversed."

There is thus express authority in this House that a court of law ought to uphold an objection, taken by a public department when called on to produce documents in a suit between private citizens, that, on grounds of public policy, the documents should not be produced. It is important to note what are the circumstances in which this specific objection may arise. When the Crown (which for this purpose must be taken to include a government department, or a minister of the Crown in his official capacity) is a party to a suit, it cannot be required to give discovery of documents at all. No special ground of objection is needed. The common law principle is well established: see *Thomas* v. *Reg.* (2). There is also the authority of Abinger C.B. for the view that the former process

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(1) 2 Brod. & B. 130; 4 Moore 563, sub nom. *Home* v. *Lord Frederick Cavendish Bentinck.*

(2) (1874) L. R. 10 Q. B. 44.

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in equity of a bill of discovery was not regarded as available against the Crown: *Deare* v. *Attorney-General* (1), but that learned judge went on to say: "At the same time it has been "the practice, which I hope never will be discontinued, for "the officers of the Crown to throw no difficulty in the way of "any proceeding for the purpose of bringing matters before a "court of justice, where any real point of difficulty that requires "judicial decision has occurred." Similarly, in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (2) Rigby L.J. said: "The law is that the Crown is entitled to full discovery, and "that the subject as against the Crown is not. That is a "prerogative of the Crown, part of the law of England, and we "must administer it as we find it. . . . Now I know that there "has always been the utmost care to give to a defendant that "discovery which the Crown would have been compelled to "give if in the position of a subject, unless there be some plain "overruling principle of public interest concerned which cannot "be disregarded." Where the Crown is a party to a suit, therefore, discovery of documents cannot be demanded from it as a right, though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made. The question which we have to decide can only arise as a matter of law in England in cases where a subpœna is issued to a minister or a department to produce a document (usually, but not necessarily, in a suit where the Crown is not a party), or where it intervenes in a suit between private individuals (as is the present case), to secure, on the ground of public interest, that documents in the hands of one of the litigants should not be produced. A similar situation might conceivably arise in litigation between the Crown and a subject where it was considered necessary to prevent the subject from producing a document in his possession on the ground that this would be injurious to public interests.

Lord Eldon, in the decision above cited, treated the rule to be applied as already well established. His reference to high treason may have been a recollection of *Rex* v. *Hardy* (3), for he (as Sir John Scott) was the Attorney-General who prosecuted on that occasion and he may well have recalled the ruling of Eyre C.J. (4). The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at

(1) (1835) 1 Y. & C. 197, 208.
(2) [1897] 2 Q. B. 384, 395.
(3) (1794) 24 St. Tr. 199.
(4) Ibid. 808.

stake, is not necessarily the same. Indeed, Eyre C.J., in the passage referred to, appears only to be restricting needless cross-examination. He says: "There is a rule which has "universally obtained on account of its importance to the "public for the detection of crimes, that those persons who are "the channel by means of which that detection is made, should "not be unnecessarily disclosed: if it can be made to appear "that really and truly it is necessary to the investigation of "the truth of the case that the name of the person should be "disclosed, I should be very unwilling to stop it." A statement to much the same effect was made by Abbott J., and confirmed by Lord Ellenborough C.J., in *Rex* v. *Watson* (1). See also *Marks* v. *Beyfus* (2).

In civil proceedings, early examples of the application of the rule may be found in *Anderson* v. *Hamilton* (3), the case before Lord Ellenborough to which Lord Eldon referred (correspondence between Colonial Department and governor of Heligoland); *William Young & Co.* v. *Commissioners of Excise* (4) (investigation by Board of Excise and communications by the board to Lords of the Treasury); *Wyatt* v. *Gore* (5) (communications between governor and attorney-general of Upper Canada); and the case quoted by Lord Eldon, *Home* v. *Bentinck* (6). This last was an action for libel. The conduct of the plaintiff, who was an Army officer, had been the subject of a military court of inquiry, of which the defendant was president, and at the trial the plaintiff called for the production of the minutes of the court of inquiry. Abbott C.J. ruled that the minutes ought not to be admitted and read in evidence, and Dallas C.J., giving judgment in the Exchequer Chamber, upheld this ruling. The language of Dallas C.J. has been quoted with approval in subsequent decisions, and I set out the following extract from it. He said (6): "It is agreed, that there are a number of cases of "a particular description, in which, for reasons of state and "policy, information is not permitted to be disclosed. To "begin with the ordinary cases, and those of a common description in courts of justice. In these courts, for reasons "of public policy, persons are not to be asked the names of "those from whom they receive information as to frauds on "the revenue. In all the trials for high treason of late years,

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(1) (1817) 32 St. Tr. 1, 101.
(2) (1890) 25 Q. B. D. 494.
(3) (1816) 2 Brod. & B. 156*n*.
(4) (1816) 19 F. C. 102.
(5) (1816) Holt N. P. 299.
(6) 2 Brod. & B. 130, 162, 163.

"the same course has been adopted; and, if parties were "willing to disclose the sources of their information, they "would not be suffered to do it by the judges. What is the "ground, upon which these cases stand, except it be the "ground of danger to the public good, which would result "from disclosing the sources of such information?—for no "person would become an informer if his name might be "disclosed in a court of justice, and if he might be subjected "to the resentment of the party against whom he had informed. "Does not this reasoning apply closely to the case now before "us? This is an inquiry directed to be made by the commander-in-chief, with a view to ascertain what the conduct "of the party suspected might have been; in the course of "which a number of persons may be called before the court, "and may give information as witnesses, which they would "not choose to have disclosed: but, if the minutes of the "court of inquiry are to be produced in this way, on an action "brought by the party, they reveal the name of every witness, "and the evidence given by each. Not only this, but they "also reveal what has been said and done by each member of "the existing court of inquiry. It seems, therefore, that the "reception of the minutes would tend directly to disclose that "which is not permitted to be disclosed; and, therefore, "independently of the character of the court, I should say, on "the broad rule of public policy and convenience, that these "matters, secret in their natures, and involving delicate "inquiry and the names of persons, stand protected."

It will be observed that the objection is sometimes based upon the view that the public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than on the contents of the particular document itself. Several cases have been decided on this ground protecting from production documents in the files of the East India Company held in its public capacity as responsible for the government of India: see *Smith* v. *East India Co.* (1); *Wadeer* v. *East India Co.* (2). In the earlier of these cases Lord Lyndhurst L.C. said (3): "Now it is quite obvious "that public policy requires, and looking to the act of

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(1) 1 Ph. 50.
(2) 8 De G. M. & G. 182.
(3) 1 Ph. 50, 55.

"parliament, it is quite clear that the legislature intended, "that the most unreserved communication should take place "between the East India Company and the Board of Control, "that it should be subject to no restraints or limitations; "but it is also quite obvious, that if, at the suit of a particular "individual, those communications should be subject to be "produced in a court of justice, the effect of that would be "to restrain the freedom of the communications, and to render "them more cautious, guarded, and reserved. I think, "therefore, that these communications come within that class "of official communications which are privileged, inasmuch "as they cannot be subject to be communicated without "infringing the policy of the act of parliament and without "injury to the public interests." On the same principle, it has been held in *H.M.S. "Bellerophon"* (1), that where a collision occurs between a ship of the Royal Navy and a ship belonging to a private owner the Admiralty cannot be required to produce the report made by the officer who is in command of the former ship. Another example is the view which has been taken that reports made by a police officer to his superior as to a street accident are protected from production though requested by a party to subsequent litigation for fixing liability between private individuals: see *Hastings* v. *Chalmers* (2); *Muir* v. *Edinburgh District Tramways Co., Ld.* (3); *Spigelmann* v. *Hocker* (4). The practice in the metropolitan police district is, I believe, in the case of a street accident where no criminal proceedings are being taken, to provide, on the application of persons interested in a possible civil claim, an abstract of any report that has been made by the policeman on the spot to his superiors, including the names of witnesses so far as known to the police. This seems an admirable way of reconciling the requirements of justice with the exigencies of the public service. The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (*a*) by having regard to the contents of the particular document, or (*b*) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

Two further matters remain to be considered. First, what is the proper form in which objection should be taken that the production of a document would be contrary to the public interest ? And, secondly, when this objection is taken in proper form, should it be treated by the court as conclusive, or are there circumstances in which the judge should himself look at the documents before ruling as to their production ?

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(1) 44 L. J. Adm. 5.
(2) (1890) 18 R. 244.
(3) 1909 S. C. 244.
(4) (1932) 50 T. L. R. 87.

On the first question, it is to be observed that the matter may arise at either of two stages in the course of a civil suit. It may arise (as in the present instance) before the trial begins out of an application for inspection of documents referred to in the affidavit of one of the parties, but it may also arise at the trial itself when a subpœna or corresponding process has been served calling for the production of the documents and there is a refusal to comply on the ground that production would be contrary to the public interest. An example of the latter class of case will be found in *Beatson* v. *Skene* (1), where Mr. Sidney Herbert, the Secretary for War, had been subpœnaed to produce the minutes of a military court of inquiry and attended personally to object on the ground that this would be prejudicial to the public interest. In this he was upheld by the trial judge Bramwell B., and by the full court. Pollock C.B. makes the observation (2): "If, indeed, the head of the department "does not attend personally to say that the production will "be injurious, but sends the document to be produced or not "as the judge may think proper, or as was the case in *Dickson* "v. *Earl of Wilton* (3) before Lord Campbell, where a sub-"ordinate was sent with a document with instructions to "object but nothing more, *the case may be different.*" In *Hennessy* v. *Wright* (4), which was an action for libel brought by the governor of a colony against the publisher of a newspaper which accused him of sending garbled reports to the Colonial Secretary, the plaintiff, on the instructions of the Secretary of State, objected to the production of a number of official communications on the ground of the interest of the State and of the public service, but there was no affidavit or statement made by the Secretary of State himself. A Divisional Court consisting of Field J. and Wills J. considered that the statements in the plaintiff's affidavit might be accepted as true, but it is noteworthy that Wills J. said (5) that, where further assurance is necessary, " I think it ought to appear that

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(1) 5 H. & N. 838.
(2) Ibid. 854.
(3) 1 F. & F. 419, 425.
(4) 21 Q. B. D. 509.
(5) Ibid. 518.

"the Secretary of State has seen and considered the documents, "and has formed a real judgment as to the propriety of their "being produced. . . . In such a case there should, in my "opinion, be a statement on oath, either by the Secretary of "State himself, or by some person duly commissioned by "him to make on his behalf such a statement, that the matter "has been considered by the Secretary of State, and that he "assures the court in one of these ways that the production "would in his opinion be prejudicial to the public service." See also *Kain* v. *Farrer* (1), where the court, before being satisfied, required the responsible minister's oath. The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, e.g., departmental minutes, to which they belong. Instances may arise where it is not convenient or practicable for the political minister to act (e.g., he may be out of reach, or ill, or the department may be one where the effective head is a permanent official) and in such cases it would be reasonable for the objection to be taken, as it has often been taken in the past, by the permanent head. If the question arises before trial, the objection would ordinarily be taken by affidavit, and a good example is provided by the affidavit of the First Lord of the Admiralty in the present case. If the question arises on subpœna at the hearing it is not uncommon in modern practice for the minister's objection to be conveyed to the court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. I see no harm in that procedure, provided it is understood that this is only for convenience and that if the court is not satisfied by this method, it can request the minister's personal attendance.

The remaining question is whether, when objection has been duly taken, the judge should treat it as conclusive. There are cases in the books where the view has been expressed that the judge might properly probe the objection by himself examining the documents. For example, Field J. said in *Hennessy* v. *Wright* (2): "I should consider myself entitled to examine "privately the documents to the production of which he"

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(1) (1877) 37 L. T. 469.

(2) 21 Q. B. D. 509, 515.

(the head of the department) "objected, and to endeavour, "by this means and that of questions addressed to him, to "ascertain whether the fear of injury to the public service was "his real motive in objecting." Scrutton J., when sitting in chambers in *Asiatic Petroleum Co., Ld.* v. *Anglo-Persian Oil Co., Ld.* (1), looked at the documents, and so did Macnaghten J. in *Spigelmann* v. *Hocker* (2). On the other hand, it has been several times laid down that the court ought to regard the objection, when validly and formally taken, as conclusive. Thus, in *Beatson* v. *Skene* (3) Pollock C.B. observed: "We "are of opinion that, if the production of a state paper would be "injurious to the public service, the general public interest "must be considered paramount to the individual interest of "a suitor in a court of justice; and the question then arises, "how is this to be determined? It is manifest it must be "determined either by the presiding judge, or by the responsible "servant of the Crown in whose custody the paper is. The "judge would be unable to determine it without ascertaining "what the document was, and why the publication of it would "be injurious to the public service—an inquiry which cannot "take place in private, and which taking place in public may "do all the mischief which it is proposed to guard against. "It appears to us, therefore, that the question, whether "the production of the documents would be injurious to the "public service, must be determined, not by the judge but "by the head of the department having the custody of the "paper; and if he is in attendance and states that in his "opinion the production of the document would be injurious "to the public service, we think the judge ought not to compel "the production of it. The administration of justice is only "a part of the general conduct of the affairs of any state or "nation, and we think is (with respect to the production "or non-production of a state paper in a court of justice) "subordinate to the general welfare of the community."

The same principle, subject to differences in procedure, is recognized and applied in Scotland. For example, in *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co., Ld.* (4), the Inner House of the Court of Session, overruling Lord Johnston, insisted that the view of the government department was final. Lord President Dunedin said (5):

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(1) [1916] 1 K. B. 822, 826.
(2) 50 T. L. R. 87.
(3) 5 H. & N. 838, 853.
(4) 1909 S. C. 335.
(5) Ibid. 340.

"It seems to me that if a public department comes forward "and says that the production of a document is detrimental "to the public service, it is a very strong step indeed for the "court to overrule that statement by the department. The "Lord Ordinary has thought that it is better that he should "determine the question. I do not there agree with him, "because the question of whether the publication of a document is or is not detrimental to the public service depends "so much upon the various points of view from which it may be "regarded, and I do not think that the court is in possession "of these various points of view. In other words, I think "that, sitting as judges without other assistance, we might "think that something was innocuous, which the better "informed officials of the public department might think was "noxious. Hence, I think the question is really one for the "department, and not for your Lordships." Lord Kinnear's judgment in the same case is especially noteworthy (1): "I "agree that we cannot take out of the hands of the department "the decision of what is or what is not detrimental to the "public service. There are only two possible courses, we "must either say that it is a good ground of objection, or "we must overrule it altogether. I do not think that we should "decide whether it would be detrimental to the public service "or not; and I agree with what your Lordships have said as "to the position of the court in reference to that question. "We do not know the conditions under which the production "of the document would or would not be injurious to the "public service. I think it is not improbable that even if an "officer of the department were examined as a witness we "should not get further forward, because the same reasons "which induced the department to say that the report itself "ought not to be produced might be thought to preclude the "department from giving the explanations required. A "department of Government to which the exigencies of the "public service are known as they cannot be known to the "court, must, in my judgment, determine a question of this "kind for itself, and therefore I agree we ought not to grant "the diligence."

In many cases there is a further reason why the court should not ask to see the documents, for where the Crown is a party to the litigation, this would amount to communicating with one party to the exclusion of the other, and it is a first principle of

(1) 1909 S. C. 335, 343.

justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other. Scrutton L.J. was, therefore, misinformed when he was told, as recorded in *Ankin* v. *London & North Eastern Ry. Co.* (1), by "a very high authority" that the practice on this point in Scotland differed from that in England. Lord Thankerton gave warning of the error in the course of the argument in *Robinson* v. *State of South Australia* (*No.* 2) (2). The practice in Scotland, as in England, may have varied, but the approved practice in both countries is to treat a ministerial objection taken in proper form as conclusive. The reasons given by Pollock C.B., by Lord Dunedin and by Lord Kinnear cannot be gainsaid. As Lord Parker said in another connection: "Those who are responsible for "the national security must be the sole judges of what the "national security requires": *The Zamora* (3). In *Robinson* v. *State of South Australia* (*No.* 2) (4), the Judicial Committee reversed the decision of the Supreme Court of South Australia, which had refused to order the inspection of documents which the minister in charge of the department objected to produce on grounds of public policy, and remitted the case to the Supreme Court with the direction that it was one proper for the exercise of the court's power of inspecting documents to determine whether their production would be prejudicial to the public welfare. I cannot agree with this view. Their Lordships' conclusion was partly based on their interpretation of a rule of court which was in the same terms as O. XXXI., r. 19A, sub-r. 2, of the Rules of the English Supreme Court. This sub-rule provides: "Where on an application for an "order for inspection privilege is claimed for any document, it "shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the "claim of privilege." In my opinion, the Privy Council was mistaken in regarding such a rule as having any application to the subject-matter. The doubt expressed on the point by du Parcq L.J. in the present case is fully justified. The withholding of documents, on the ground that their publication would be contrary to the public interest, is not properly to be regarded as a branch of the law of privilege connected with discovery. "Crown privilege" is for this reason not a happy expression. Privilege, in relation to discovery, is for the protection of the litigant and could be waived by him, but the rule that the interest of the state must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation, and, indeed, is a rule on which the judge should, if necessary, insist, even though no objection is taken at all. This has been pointed out in several cases, e.g., in *Chatterton* v. *Secretary of State for India*, per A. L. Smith L.J. (1).

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(1) [1930] 1 K. B. 527, 533.
(2) [1931] A. C. 704, 708.
(3) [1916] 2 A. C. 77, 107.
(4) [1931] A. C. 704.

Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce "except under the order of this honourable court." It is the judge who is in control of the trial, not the executive, but the proper ruling for the judge to give is as above expressed. In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are "State documents" or "official" or are marked "confidential." It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of oral evidence which, if given, would jeopardize the interests of the community. Indeed, Lord Eldon's language, already quoted, implies this. After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation. I move that the appeal be dismissed, with costs.

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(1) [1895] 2 Q. B. 189, 195.

I am authorized by my noble and learned friends, LORD THANKERTON, LORD RUSSELL OF KILLOWEN and LORD CLAUSON, who are not able to be present, to say that they concur in this opinion.

LORD MACMILLAN. My Lords, I also concur.

LORD WRIGHT. My Lords, I also concur.

LORD PORTER. My Lords, I concur.

Appeal dismissed.

Solicitors for appellants: *Evill & Coleman.*

Solicitors for respondents: *Carpenters, for Laces & Co., Liverpool.*

[HOUSE OF LORDS.]

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Feb. 10, 12, 13, 16;
Apr. 27.

THOMAS FATTORINI (LANCASHIRE), LIMITED . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue — Sur-tax — Company — Undistributed income — Loan from bank—Agreement to pay total income to bank—Direction that for purposes of sur-tax income be deemed income of members—Validity—

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* *Present*: VISCOUNT SIMON L.C., LORD ATKIN, LORD MACMILLAN, LORD WRIGHT and LORD PORTER.

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Onus of proof—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-s.* 1—*Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 14, *sub-s.* 2—*Investment company—Right to deal with income.*

By s. 21, sub-s. 1, of the Finance Act, 1922, and s. 14, sub-s. 2, of the Finance Act, 1937, if it appears to the Special Commissioners of Income Tax that a company to which s. 21 applies, being an investment company, has not within any year of assessment distributed to its members, in such manner as to make the amount distributed liable to be included in the statements to be made by them of their income for the purposes of sur-tax, a reasonable part of its actual income, the commissioners may direct that for purposes of assessment to sur-tax the income of the company shall be deemed to be the income of the members.

A company, which was purely an investment company and to which s. 21 applied, borrowed a sum of money from a bank to enable it to buy shares in other companies, and entered into an agreement with the bank, regarding the bona fides and reasonableness of which there was no question, that, until all the money advanced, with interest thereon, had been repaid, it would pay to the bank all the dividends which it would receive in respect of those shares. In the years 1936–37 and 1937–38 the dividends so received constituted the sole income of the company which paid no dividend in those years. Directions were made under s. 21 that the actual income of the company for those years should be deemed to be the income of its members for purposes of assessment to sur-tax:—

Held, that, though the contract with the bank did not bind the company not to distribute a dividend, the evidence did not establish that the company had not distributed a reasonable part of its income, and, accordingly, the direction should be discharged. The question whether it was reasonable for the company to make such a contract was irrelevant.

There is nothing in law to prevent a company from using an income receipt as cash in its hands to discharge a capital liability or to purchase a capital asset and subsequently paying a dividend out of other cash or borrowing for the purpose to the extent of the credit balance standing on profit and loss account. The general proposition that investment companies are obliged to distribute their profits to their shareholders cannot be sustained. They are entitled, if they choose, to forego their income for a time to develop or improve the undertaking.

Per Lord Atkin. It is not sufficient for the Crown to establish that a part of the company's income could reasonably have been distributed, if it can be said that it was equally reasonable to withhold distribution. Sect. 21, sub-s. 1, of the Finance Act, 1922, is highly penal and the onus rests on the Crown to show that the company acted unreasonably. It must show what would have been a reasonable sum to distribute. "Actual income" in s. 21, sub-s. 1, means, not the specific receipts of the company from time to time, but the "income tax income" as calculated at the end of the year of assessment.

Per Lord Macmillan. It may well be that when the Special

Commissioners have made a direction under s. 21, sub-s. 1, it is for the company to put forward reasons, and, if necessary, evidence, to show why the direction is in the circumstances unjustified.

Per Lord Porter. A company is entitled to manage its own business in its own way, and the question is not whether, in so doing, it has taken a reasonable course, but whether, a particular course having been taken, it has distributed a reasonable part of its income. The onus of proof is on the Crown.

Glazed Kid, Ld. v. *Inland Revenue Commissioners* (1930) 15 Tax Cas. 445 disapproved.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON L.C. and LORD ATKIN, were as follows:—

The appellant company was a company "under the control "of less than five persons" to which s. 21 of the Finance Act, 1922, applied and was purely an investment company. It was incorporated in 1919 with a nominal capital of 25,000*l.* divided into 15,000 ordinary and 10,000 preference shares of 1*l.* each of which 15,000 ordinary and 1765 preference shares were issued as fully paid up. The appellant company was formed to acquire a retail jewellery and mail order business carried on at Bolton by Thomas Fattorini, and in June, 1919, it duly acquired the business for 14,724*l.* paid as to 12,000*l.* in fully paid shares and the balance in cash. There were at this time three other companies (hereinafter called "the "operative companies") in existence in each of which Thomas Fattorini was the principal shareholder: (1.) Thomas Fattorini (Skipton), Ld., incorporated in 1919 with an issued capital at the material date of 47,980 ordinary and 4200 preference shares of 1*l.* each. (2.) Thomas Fattorini (Birmingham), Ld., afterwards named Thomas Fattorini, Ld., with an issued capital of 13,480 ordinary shares of 1*l.* each. (3.) H. Pevison, Ld., with an issued capital of 24,980 shares of 1*l.* each. Company No. 1 carried on a jewellery and mail order business at Skipton. Company No. 2 carried on the business of manufacturing medals and badges at Birmingham. Company No. 3 carried on the business of cycle dealers. Thomas Fattorini did not acquire his interest in this company until November, 1919. In 1924 the cycle business ceased and the company thereafter carried on a mail order business in Manchester. In 1928 the appellant company discontinued its jewellery business, and sold its mail order business to company No. 1 for 14,000*l.* which it lent to one of the three operative companies named. From that date up to 1936 it carried on its existence as an investment company, distributing annually dividends of about 500*l.* or 600*l.* derived from the interest on the loans mentioned. In the appellant company Thomas Fattorini was the principal shareholder, the other being apparently his son, Wilfred. In June, 1934, Thomas Fattorini died and his son, Wilfred, acquired his father's shares in the appellant company, being registered in respect of them in September, 1936. After that date he and his wife were the sole shareholders in, and directors of, the company. In the same year the appellant company proceeded to buy the shares held by the executors of Thomas Fattorini and by his other son, Frank, in the three operative companies. The shares held by Frank were bought from him by an agreement made in the early part of 1936. The total price was 18,229*l.* which the appellant company paid out of its own resources, realizing the loan for that purpose. The shares were transferred in August, 1936. At the same time the appellant company proceeded to buy the remaining shares in the operative companies, namely, those held by the executors of Thomas Fattorini and by Wilfred himself. These further shares amounted to 77,240 and the price to be found was about 105,000*l.* so that the shares were bought at a premium. The appellant company, having no sufficient resources of its own by means of which to make the purchase, approached Martins Bank, Ld., which agreed to provide the necessary overdraft. On September 22, 1936, an agreement was made under which the bank undertook to advance a sum not exceeding 108,000*l.* at a stipulated rate of interest. Its loan was secured by a deposit of all the shares in the operative companies, both those then to be purchased and those already purchased from Frank. The company bound itself, until the loan was completely discharged, to pay to the bank all the dividends it received from the shares in reduction of the amount due to the bank from time to time for payment of capital and interest. There was a stipulation that the operative companies should not during the period of the loan pay directors' fees in excess of 6000*l.* a year. The bank requested that the loan should be paid off within two and a half to three years. With this advance, supplemented by its own cash, the appellant company acquired all the shares in the operative companies at a total cost of 121,221*l.* There was no finding that the agreement was made in bad faith or to avoid sur-tax and the Crown expressly disclaimed any attack on it as being unreasonable. Dividends from the shares in the operative companies were the appellant company's sole source of income. In the financial year 1936–37 the income from all investments was 6540*l*., and in the financial year 1937–38 no less than 34,855*l*., or deducting bank interest (in the first year for half a year) 5340*l*. and 31,140*l*. respectively. These amounts were paid to the bank in accordance with the agreement, with the result that the bank loan was proportionately reduced. The appellant company declared no dividend during or in respect of the two years referred to. The Special Commissioners, acting under the powers conferred upon them by s. 21 of the Finance Act, 1922, as amended, directed that for the purpose of assessment to sur-tax, the total income from all sources of the company for the years of assessment 1936–37 and 1937–38 respectively should be deemed to be the income of the members of the appellant company, and that the amount should be apportioned among them. The appellant company appealed to the Special Commissioners in their judicial capacity against that direction, and the Special Commissioners allowed the appeal and discharged the direction for both years. The respondents required the appeal to be reheard by the Board of Referees which, subject to a case stated, reversed the decision of the Special Commissioners and restored the direction. The paragraphs of the special case which raised the matters to be decided were the following: "23. We the members of the board sitting to rehear "the appeal hold as a matter of construction of the contract "with Martins Bank that it would not have been a breach of "contract for the company to distribute a dividend, and we "found as a fact that, if we were wrong on this point and a "distribution of a dividend would have been a breach of "contract, it was not reasonable for the company to make "such a contract. We hold that the case of *Glazed Kid, Ld.* v. "*Inland Revenue Commissioners* (1) was distinguishable as it "was assumed in the judgment in that case that the distribution "of a dividend could only have been made if moneys payable "to the bank had been retained, a course which would have "been restrained by injunction, and there appeared to be no "argument that the contract was not a reasonable contract. "24. We considered that, as the company was an investment "company which after August 24, 1936, held investments

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(1) (1930) 15 Tax Cas. 445.

"producing revenue for which the company had paid 18,000*l.*, "there was a prima facie case that the reasonable course was "that the company should so manage its affairs as to provide "for distribution of dividend, and that the company had not "displaced such prima facie case by evidence that this could "not have been done without jeopardising the interests of the "company or without making it impossible to acquire the "shares which it desired to buy. 25. We found as a fact that "the company had not within a reasonable time distributed "in the manner referred to in s. 21 of the Finance Act, 1922, "a reasonable part of its income for either of the periods in "question." The questions for the opinion of the court were stated: "(1.) Whether our conclusions of law as set forth in "para. 23 were correct. (2.) Whether there was evidence to "support our finding of fact as set forth in para. 25. "(3.) Whether the matters set forth in para. 24 are such as to "show that we misdirected ourselves as to the onus of proof "in a case where it is admitted that an investment company "with a substantial income has not distributed any part of it." The Special Case came before Macnaghten J. who delivered judgment reversing the determination of the Board of Referees and restoring that of the Special Commissioners. From this decision the respondents appealed to the Court of Appeal (Scott, Clauson and Goddard L.JJ.) which reversed the decision of Macnaghten J. and restored the determination of the Board of Referees. The appellant company appealed to the House of Lords.

Donovan for the appellant company. For twelve years after super-tax was introduced in 1910 the legislation left it open to the taxpayer to avoid it, since it was imposed only on the individual, by the formation of a limited company, from which he obtained his income by way of loan. In a liquidation the taxpayer, though indebted to the company, was usually the sole contributory and entitled to all the assets: see *Inland Revenue Commissioners* v. *Blott* (1). The object of s. 21 of the Finance Act, 1922, was to put a stop to this. The section was amended by s. 31 of the Finance Act, 1927, which Act introduced sur-tax: see s. 41, sub-s. 10. By the Finance Act, 1936, the legislature sought to deal comprehensively with the problems of this matter dividing companies into "investment companies" and "trading companies":

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(1) [1921] 2 A. C. 171.

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see s. 20. The Finance Act, 1937, s. 14, sub-s. 1, further dealt with s. 21 of the 1922 Act: see also the Finance Act, 1939, ss. 14 and 15, by which it is made more difficult for investment companies to escape sur-tax. In *Glazed Kid, Ld.* v. *Inland Revenue Commissioners* (1) Rowlatt J. said that it could not be said that the company had not distributed a reasonable part of its income when it could not distribute any part of its profits because the whole of them, which solely consisted of dividends, were under contract receivable by somebody else. The present case bears no resemblance to *Montague Burton, Ld.* v. *Inland Revenue Commissioners* (2), because here the directors had no sum which they were free to apply to any purpose, since the appellant company's whole income had already been taken by the bank. If it can be shown that the actual income has been paid to some other person, it cannot be unreasonable not to distribute it, since that is impossible. It would not be reasonable to obtain money from other sources to pay a dividend, and in the particular circumstances of this case it would not be possible. One can apply the standard of reasonableness only to something actual and not to something notional. It is presupposed by s. 21 that the company can distribute a reasonable part of its actual income from all sources. The appellant company could not do so. There was no evidence on which the Board of Referees could reach their conclusion. [He also referred to *Ormond Investment Co., Ld.* v. *Betts* (3).]

Sir William Jowitt S.-G. and *R. P. Hills* for the respondents. The question whether a payment should be made has little to do with the question whether there is money in the till. The appellant company has not distributed a reasonable part of its income within the meaning of s. 21 of the Act of 1922. Obviously, the fact that the company has spent the income is irrelevant in dealing with that section, since it does not prevent a dividend being paid. *Glazed Kid, Ld.* v. *Inland Revenue Commissioners* (1) was wrongly decided. The income of the company should not be looked at for this purpose in specie as identifiable money since the assets cannot be confined to cash. It is the profit and loss account which must be looked at. The "actual income" of the company is not limited to receipts. The question is whether as a matter of business convenience a dividend could have been paid and the

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(1) 15 Tax Cas. 445, 456.
(2) (1934) 105 L. J. (K. B.) 236.
(3) [1928] A. C. 142.

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Board of Referees have held that it could. Each case under s. 21 must be considered on its facts. There is no suggestion that the appellant company would have had any difficulty in borrowing a sum to pay a dividend, or that it would have had to pay exorbitant rates of interest on the loan. This is the case of an investment company and so there is no question of its incurring large expenses such as might justify a trading company in putting sums to reserve instead of paying dividends. Thus, apart from the loan from the bank, there was no reason why a dividend should be withheld. It is admitted that this matter must be discussed on the basis that there is no finding that the contract with the bank is unreasonable, but that contract does not prevent the payment of a dividend. The basis on which s. 21 fundamentally proceeds is that it is the object of a profit-earning company to pass on that profit to its members in the form of a dividend, and the legislation assumes that it will so pass on a reasonable part of its income, that is, as much as it can. The company's own decision not to pay a dividend cannot be final. That is a question for the Special Commissioners and the Board of Referees. It is not necessary for them to find exactly what would have been a reasonable amount to distribute: *Colville Estates, Ld.* v. *Inland Revenue Commissioners* (1). Here 500*l.* or 600*l.* might have been reasonable. Once a direction is made the onus of proof is on those seeking to displace it. In the present case there is no ground in law for holding that it was wrong. They referred to *Central London Railway Co.* v. *Inland Revenue Commissioners* (2); *Robinson* v. *Sunderland Corporation* (3); *John White's Trust, Ld.* v. *Inland Revenue Commissioners* (4); *Montague Burton, Ld.* v. *Inland Revenue Commissioners* (5).

Donovan in reply. The proper inference from the facts is that the appellant company could not have borrowed money on reasonable terms. Therefore, it was not unreasonable to declare no dividend.

The House took time for consideration.

1942. April 27. VISCOUNT SIMON L.C. My Lords, counsel for the appellant company, in his excellent argument, placed before the House the statutory history of successive

(1) [1930] 2 K. B. 393.
(2) [1937] A. C. 77.
(3) [1899] 1 Q. B. 751, 757.
(4) (1937) 21 Tax Cas. 391.
(5) 105 L. J. (K. B.) 236.

efforts made by the legislature to prevent the avoidance of super-tax, or of its successor sur-tax, by using the cloak afforded by company law. Since the tax is charged only in respect of the income of an individual, its incidence might be avoided by transferring to a company controlled by such an individual, in return for shares, the source of such income and by securing that, instead of any dividends being declared, the profits made by the company should be accumulated and ultimately distributed in a capital form as the results of voluntary liquidation or by creating bonus shares: *Inland Revenue Commissioners* v. *Blott* (1); or otherwise. Accordingly, by s. 21 of the Finance Act, 1922, it was enacted: "With a view to preventing the avoidance of the payment "of super-tax through the withholding from distribution of "income of a company which would otherwise be distributed, "it is hereby enacted as follows: (1.) Where it appears to "the Special Commissioners that any company to which this "section applies has not, within a reasonable time after the "end of any year or other period ending on any date subsequent "to April 5, 1922, for which accounts have been made up, "distributed to its members in such manner as to render the "amount distributed liable to be included in the statements "to be made by the members of the company of their total "income for the purposes of super-tax, a reasonable part of "its actual income from all sources for the said year or other "period, the commissioners may, by notice in writing to the "company, direct that for purposes of assessment to super-tax, "the said income of the company shall, for the year or other "period specified in the notice, be deemed to be the income "of the members, and the amount thereof shall be apportioned "among the members: Provided that, in determining "whether any company has or has not distributed a reasonable "part of its income as aforesaid, the commissioners shall have "regard not only to the current requirements of the company's "business but also to such other requirements as may be "necessary or advisable for the maintenance and development "of that business." The first schedule to the Act of 1922 provides that "actual income from all sources" is to be computed by reference to the income for the year in question and not to that of a past period. To complete the statutory scheme as it applied to the years 1936–37 and 1937–38, it is necessary to add a reference to the Finance Act, 1927, s. 31, and the Finance Act, 1936, s. 20. These later enactments, however, do not affect the present case, since the shares of the operative companies purchased as the result of the agreement of September 22, 1936, were not the first property of a substantial character acquired by the investment company, and, moreover, the loan was from a bank. Mr. Donovan pointed out that the legislature has now, in the case of some investment companies, made it more difficult to escape the burden of sur-tax: see Finance Act, 1939, s. 14, sub-s. 1; but this is outside the period within which the present dispute falls, and it must not be assumed as a matter of statutory construction that earlier provisions have a particular meaning because, if so interpreted, the need for the later enactment is elucidated.

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(1) [1921] 2 A. C. 171.

As regards para. 23 of the special case, I agree that the contract with the bank did not bind the appellant company not to distribute a dividend, and inasmuch as the appellant company made profits in each of the years in question, the fact that it used the dividends it received (as it was bound to do) in reducing the charge on the shares did not make it unlawful to distribute a dividend. There is nothing in law to prevent a company using an income receipt as cash in its hands to discharge a capital liability or to purchase a capital asset and then, after the close of its financial year, paying a dividend out of other cash or borrowing for the purpose to the extent of the credit balance standing on profit and loss account. This was very clearly explained by my noble and learned friend Lord Romer, when sitting in the Court of Appeal in *Montague Burton, Ld.* v. *Inland Revenue Commissioners* (1), and his view was affirmed on appeal to this House, particularly in the speeches of Lord Hailsham L.C. (2), and of Lord Russell of Killowen (3). The Board of Referees sought to distinguish the decision of Rowlatt J. in *Glazed Kid, Ld.* v. *Inland Revenue Commissioners* (4), where the company made a very similar arrangement to borrow from a bank the purchase price of shares on the terms that it paid over to the bank the dividends as received. Macnaghten J., in reversing the decision of the Board of Referees, declared himself unable to see the distinction, and I agree with him. The judgments in

(1) (1934) 152 L. T. 8, 16; 20 Tax Cas. 48, 70.

(2) 105 L. J. (K. B.) 236, 239; 154 L. T. 355, 359, 360.

(3) 105 L. J. (K. B.) 236, 240; 154 L. T. 359, 360.

(4) 15 Tax Cas. 445.

income tax cases of Rowlatt J. deserve, in my opinion, particular attention, but in this instance, with all respect to that learned judge, his view cannot be upheld. He said (1): "It is not open to anyone to say that they" [the Glazed Kid company] "have not distributed a reasonable part when they "could not distribute any part of what were their profits, "because every penny of those profits, which solely consisted "of these dividends, were under contract receivable by some-"body else." This is to confuse the use made of an income receipt to discharge a capital liability with the quite distinct question of the use of a credit balance on the profit and loss account to justify the distribution of a dividend.

As for para. 24 of the special case, the commissioners had contended before the Board of Referees that, as the appellant company was purely an investment company, its profits should have been distributed to its shareholders. I do not think that this general proposition can be sustained. As already pointed out, the additional investments were highly profitable. There was no evidence that the company could have financed its purchase on less onerous terms, and the Solicitor-General rightly admitted that it was no part of the case for the revenue before this House that the appellant company should not have entered into this bargain with the bank. As Scott L.J. observed, a finding that it was "not "reasonable to make such a contract" is irrelevant.

There remains para. 25, which contains a finding of fact in the exact terms which would justify the commissioners' direction under s. 21. The question to be decided is whether there was evidence to support this finding of fact, and the answer to that question must be found by examining the contents of the case and of the annexed documents. The case does not state what the evidence was on which the Board of Referees relied in coming to this conclusion. If the finding in para. 25 is to be treated as based on the board's view, expressed in para. 24, that the company had not followed a reasonable course in making its agreement with the bank, then this view, as I have already pointed out, would not provide a firm foundation for the conclusion. Apart from this, the only material on which the conclusion in para. 25 can be regarded as based is the fact, to be deduced from the documents, that the company might still pay a dividend if it could borrow the necessary amount on the equity of redemption

(1) 15 Tax Cas. 456.

of the deposited shares. This would be an unusual proceeding, and there is no evidence referred to in the case that it would be commercially possible for the company to do so or to support the view that, in the circumstances, the failure to do so would amount to a failure to distribute a reasonable part of the company's actual income. I do not forget that the Board of Referees is a tribunal of business men capable of applying a business judgment to the question before them, but I find it impossible to say that the case contains conclusions of fact which will support the finding in para. 25, when in truth no such conclusions are formulated at all. There is no evidence on the matter to be found in the case, and in the absence of material adequate to support the conclusion, I think the House is bound to answer the question put in the negative and to allow the appeal. I move that the appeal be allowed with costs.

LORD ATKIN. My Lords, there is no doubt that the appellant company comes within the terms of the relevant section which for this purpose is s. 14, sub-s. 2, of the Finance Act, 1937: "In the case of a company to which s. 21 of the Finance Act, "1922, applies, being an investment company, the following pro-"vision shall have effect: (*a*) The Special Commissioners may, if "they think fit, give a direction under sub-s. 1 of that section "if it appears to them that the company has not within any "year of assessment distributed to its members in such manner "as to render the amount distributed liable to be included in "the statements to be made by the members of the company "of their total income for the purposes of sur-tax a reasonable "part of its actual income from all sources for that year. . . . ." By the appropriate sections dealing with appeals, the Board of Referees on appeal take the place of the Special Commissioners and can give the statutory direction. The board are a special tribunal appointed, indeed, by the Treasury, though not to be lions under the Treasury chair, but to decide disputes judicially between Crown and subject, holding the scales impartially between them. No criticism at all has been directed against them in this respect. Their findings of fact are final, and their decisions can only be questioned on case stated on points of law. The Board of Referees have found that the company had not within a reasonable time distributed in the manner referred to in the section a reasonable part of its income for either period, and restored the direction of the first Special

Commissioners that the actual income of the appellant company from all sources should be deemed to be the income of the members and the amount apportioned among them. It is unnecessary to emphasize the highly penal nature of the section. It matters not how small a proportion of the whole income is "the reasonable part" found not to have been distributed. If the company are in fault over a few hundred pounds the shareholders may be credited with many thousands of pounds with correspondingly heavy liabilities for sur-tax. In the present case the Board of Referees have not found what would have been a reasonable sum to distribute. It is said that they have the support of some decision for this. If it be so, I can only say that the decision is wrong in a case stated such as this where the question is whether there was evidence to support the decision. I find it impossible to approach the question whether there was evidence to support a finding that "a reasonable part" should be distributed without knowing what part it was considered reasonable to distribute, at least stated as a minimum. In the present case the Solicitor-General stepped into the breach and suggested that at least the appellant company should have distributed 500*l.* or 600*l.*, an amount corresponding to its resources before it embarked on the purchase of the operative companies' shares.

The first question stated by the board refers to a contention that under the agreement with the bank it would have been a breach of contract to distribute a dividend. No such contention was sought to be made by the appellant company before this House, and the question becomes irrelevant. The remaining questions are connected and should be set out. In para. 24 of the case the Board of Referees state: "We "considered that as the company was an investment company "which after August 24, 1936, held investments producing "revenue for which the company had paid 18,000*l.* there was a "prima facie case that the reasonable course was that the "company should so manage its affairs as to provide for "distribution of dividend, and that the company had not "displaced such a prima facie case by evidence that this "could not have been done without jeopardising the interests "of the company or without making it impossible to acquire "the shares which it desired to buy." Incidentally, it is not to me clear whether this means that the company had failed to produce the kind of evidence referred to, and that, if they had produced the evidence, they might have displaced the prima facie case, or that there was evidence of the nature referred to but it did not displace the prima facie case. I think it probably means the former. In para. 25 they say: "We found as a fact that the company had not within a "reasonable time distributed in the manner referred to in s. 21 "of the Finance Act, 1922, a reasonable part of its income for "either of the periods in question." The two questions now relevant posed by the board are: "(2.) Whether there was "evidence to support our finding of fact as set forth in para. 25. "(3.) Whether the matters set forth in para. 24 are such as "to show that we misdirected ourselves as to the onus of proof "in a case where it is admitted that an investment company "with a substantial income has not distributed any part "of it." I do not know whether there is any meaning in the inversion of order of the paragraphs in the questions as put. In any case, I should conclude that, if the board adopted a view as to the prima facie value of certain facts and the failure of the appellant company to displace those facts, their final decision that the appellant company had not distributed a reasonable part of its income was necessarily based on their expressed view of the prima facie case made and not displaced. On what other footing could the board have reached a final decision on the facts? It would follow that, if they have in fact misdirected themselves in para. 24, their finding of fact in para. 25 is invalidated by this misdirection.

It seems clear that the discussion must proceed ab initio on the footing that the action of the directors must be judged by considering what their conduct would reasonably be if no question of sur-tax influenced their decision. Withholding of distribution for the purpose of "avoidance of the payment "of sur-tax" by shareholders would, if found, obviously negative the reasonableness of any part so withheld. The other general point to be observed is that, as it seems to me, what has to be found is that the company acted unreasonably in withholding some part of its income from distribution. It is not enough to show that a part could reasonably be distributed, if at the same time it could be said, as it well might, that it was equally reasonable to withhold distribution. The section is highly penal, and I feel no doubt that the onus is originally and remains on the revenue to show that the company acted unreasonably in withholding part of its income from distribution. What is reasonable has consistently been held to depend on the actual conditions known at the time for decision. In the application of this section it is what *these* directors recommend and *these* shareholders decide in *those* conditions of *that* company. There is no abstract conception of reasonableness, and the conclusion is not to be reached on a priori reasoning. Assuming that the directors are business men, have they acted unreasonably in the circumstances in withholding a distribution ? From this point of view I am quite unable to agree that the fact that a company, even an investment company, during the year holds income-producing investments raises a prima facie case that the reasonable course for the company is so to manage its affairs as to provide for that income or any part of it to be distributed. It is certainly untrue of private commercial companies of whom I have no doubt numbers are now prospering because the members have year after year placed all their profits in the business and have forgone any income other than such as they may derive from directors fees or the like, and I see no reason why the supposed rule should apply to investment companies who are equally entitled, if they choose, to forgo their income for a time to develop and improve the company's undertaking. I think, therefore, that the answer to question (3.) is that the matters referred to do show that the board misdirected themselves as to the onus of proof.

But I also think that the facts stated by the board disclose no evidence on which it could be found that the company failed to distribute a reasonable part of its income in the years in question. We may eliminate the question which interested the Court of Appeal, whether it was legal for the appellant company, having disposed legally of all its income for the year, to distribute a dividend at all. It was pointed out in the Court of Appeal that if the appellant company had made profits it would be perfectly legal to distribute them if it could secure the means to do so out of its other free assets or by borrowing. The point was not argued before us by Mr. Donovan in his cogent and convincing address. Whether it would be reasonable to exercise the legal right is another and the only relevant question. It will be convenient here to deal with the argument which was pressed on us by Mr. Donovan that in the present case the dividends from the operative companies shares formed the whole of the "actual" income of the company within the meaning of s. 21 of the Act of 1922, and that, as the whole of that "actual" income had been assigned to the bank, there was no part of it which could have been distributed. My Lords, the Court of Appeal have effectively disposed of this argument. Actual income does not mean the specific receipts that come in from time to time, but the "income tax income" as calculated at the end of the year of assessment. To hold otherwise would make nonsense of the section when applied to commercial companies, who use their receipts as soon as they come in, and hardly ever have left for distribution the actual incomings as sought to be defined in the argument. But when one begins to consider the circumstances of this company at the end of this year when they had to consider the distribution of dividend I am at a loss to see what was unreasonable in their decision to distribute nothing. There were only two shareholders, in substance, only one, Wilfred. They had agreed shortly before by an agreement, which is not now in any way attacked, to assign the whole of their resources to the bank to secure what appeared to be a profitable and reasonable purchase. As a result the appellant company had not any asset left nor any source of free income. They, therefore, could not procure the funds with which to distribute a dividend without borrowing. They had no source of income from which they could pay interest on any loan. If they had to borrow from some one other than the bank they would have had, therefore, to pay some capital premium in lieu of interest calculated for the period of the bank loan, and, presumably in the circumstances, heavy. It was suggested that they might have approached the bank either for the necessary loan or to release some of the dividends. But the appellant company were represented by the very two people, the only persons interested, who had only a few months before in an agreement which is unassailable agreed to carry out the bank's stipulation that the loan should be paid off in two or three years by surrendering for the time being all the dividends. What is the overwhelming impulse to declare dividends that would now induce them to depart from the bank arrangement, or induce the bank to vary it? In view of these considerations it appears to me that it was for the inland revenue authorities to give evidence indicating not only that it was possible for the company to borrow (the Court of Appeal say that it would have been easy to borrow), but that in the circumstances it was the reasonable thing to do. In the result, therefore, I come to the clear conclusion that there was no evidence that the company failed to distribute a reasonable part of its income. I regard the case as turning on the bank agreement. As long as that remains unassailed, it must necessarily have controlled the actions of the appellant company, and their reasonable decisions. The Court of Appeal spoke of "the "whole plan in the present case for protecting its two share-"holders from sur-tax." I cannot reconcile this phrase with their attitude towards the bank agreement, nor do I find it supported by any finding of the Board of Referees. If the arrangement with the bank was, in fact, made as part of a plan for avoiding sur-tax there might very well be evidence of a failure to distribute a reasonable part of the income, but, in the absence of any evidence or finding to that effect and in view of the respondents' disclaimer of any attack on that agreement, it must be taken to represent a genuine business arrangement and is a circumstance of the highest importance in estimating the reasonableness of the company's action.

I am of opinion, therefore, that the answer to question (2.) should be "No" and to question (3.) "Yes"; that the appeal should be allowed, the order of the Court of Appeal should be set aside, and the order of Macnaghten J. restored; and that the respondents should pay the costs in this House and in the Court of Appeal.

LORD MACMILLAN. My Lords, sur-tax, like its predecessor super-tax but unlike income tax, is charged not at a standard rate but on an ascending scale on successive portions of the total income of the taxpayer above a minimum. It is thus necessarily a tax on individuals. It is not levied on companies for it is not capable of being accommodated to the system whereby income tax is deducted from dividends at the source, inasmuch as the rates of sur-tax vary with the incomes of the individual shareholders.

The immunity of companies from this tax has not unnaturally led to the adoption of various ingenious devices whereby individuals have sought to transform their income into the income of a company and so to escape the tax. The machinery of the Companies Acts, and, particularly, the provisions applicable to private companies, enabled this to be done with some success, but if such devices were to be effective it was necessary that the company should not distribute its profits in dividends, for dividends received by an individual must be

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included in the computation of his total income for sur-tax purposes. Schemes were, accordingly, devised whereby the profits of the company should ultimately reach the shareholders otherwise than in the form of dividends, for example, by way of loans or through a liquidation. The legislation on the subject illustrates the usual competition in ingenuity between the tax gatherer and the tax evader which has rendered the revenue statutes increasingly complicated. The particular legislation with which your Lordships are concerned in the present case is designed to circumvent the expedient whereby the income of a company, in consequence of its refraining from distributing its profits, never reaches its shareholders in the form of dividends, and, accordingly, never becomes liable to sur-tax in their hands. The method which has been devised to defeat such schemes is to be found in s. 21 of the Finance Act, 1922, as amended by subsequent Acts. Thereby the Special Commissioners, where it appears to them that any company has not within a reasonable time after the end of any year distributed to its members "a "reasonable part of its actual income," are empowered to direct that the said income shall be deemed to be the income of its members, among whom it shall be apportioned. The amount attributed to each member thus becomes part of that member's total income for sur-tax purposes. This is a severe deterrent, for it subjects to sur-tax the whole actual income of the company (on the assumption that all its members reach the sur-tax level) and not merely such part of that income as it might be held to have been reasonable to distribute.

Regard being had to the form in which the matter comes before your Lordships' House, there is, in my opinion, only one question for decision, namely, whether on the facts as stated by the board to have been found by them there was evidence on which they could in law decide as they did. Two matters dealt with by the board have first to be considered. They held (I.) that as a matter of construction of the contract with the bank it would not have been a breach of contract for the appellant company to distribute a dividend. That is clearly right, but it is equally clear that it would have been a breach of contract to apply the dividends which the appellant company received and which were its sole source of income to payment of a dividend to its own shareholders. Therefore, if the appellant company were to pay a dividend, it must find the money from some other source than the dividends which it had itself received. The only possible source suggested by the inland revenue is that "if necessary the company "could lawfully have borrowed the necessary money to enable "it to make such distribution," but in the stated case the board do not find in fact that the company could have borrowed the necessary money or that it would in the circumstances have been reasonable for the company to do so. Then (2.) the board found as a fact that, if they were wrong in holding that the company without breach of contract could have declared a dividend, "it was not reasonable for the company to make "such a contract." At your Lordships' Bar, however, the Solicitor-General for the Crown expressly disclaimed any attack on the appellant company's contract with the bank as being in itself unreasonable. I think this concession was rightly made for, considered apart from any question of taxation, the contract appears quite unobjectionable.

Once it is conceded that the contract is not assailable as unreasonable, and, consequently, that it was not unreasonable for the appellant company to contract to pay over its whole income to the bank, it becomes difficult to see how it can be said to have been unreasonable to refrain from distributing dividends which could have been provided only out of borrowed money. No indication is given of any grounds on which it would have been reasonable for the company to borrow money to enable it to pay a dividend. If a dividend had been paid it would not in fact have been paid out of profits, but out of borrowed money. It would not have been a distribution of profits but a distribution of borrowed money which it was legitimate to distribute because a corresponding amount of profits had been earned. What, then, is the finding in fact by the board which your Lordships are asked to hold as justifying the board's conclusion that the appellant company had not distributed in dividends a reasonable part of its income? It is to be found in para. 24 of the stated case which expresses the opinion of the board that, "as the com- "pany was an investment company which after August 24, "1936, held investments producing revenue for which the "company had paid 18,000*l.* there was a prima facie case "that the reasonable course was that the company should so "manage its affairs as to provide for distribution of dividend, "and that the company had not displaced such prima facie "case by evidence that this could not have been done without "jeopardising the interests of the company or without making "it impossible to acquire the shares which it desired to buy." The reference to the figure of 18,000*l.* relates to the purchase price of the shares which the appellant company bought from its own resources as distinct from the money borrowed from the bank.

It will be observed that the paragraph I have quoted puts the matter as one of onus. Now, it may well be that when the Special Commissioners make a direction under s. 21 of the 1922 Act it is for the company to put forward reasons, and, if necessary, evidence, to show why the direction is in the circumstances unjustified. Here the appellant company put forward their contract with the bank as justifying their having made no distribution of their income in dividends, and the Crown admit that it was quite reasonable for the company to contract to apply its income as it did. It seems to me that it was then for the Crown to show that it would have been reasonable for the company, notwithstanding its contract with the bank, to raise money by borrowing or otherwise in order to pay a dividend as there was no legal obstacle to its doing so, and that the company could in fact have raised the necessary money. There is no trace of any such evidence in the case. But when the matter reaches the stage of a stated case, the question is not properly one of onus. It is simply a question whether the facts found and stated afford evidence on which the board could properly arrive at their conclusion. All that para. 24 of the stated case finds is that prima facie the reasonable course was that the company should so manage its affairs as to provide for distribution of dividend. This is rather an expression of opinion than a statement of fact, and no grounds are given for it.

The result is that, in my opinion, the board have not stated any facts such as to justify them in holding that the appellant company failed to distribute a reasonable part of its actual income in the years in question. I am, accordingly, in agreement with all your Lordships that the appeal should be allowed.

LORD WRIGHT. My Lords, I have considered in print the speech which my noble and learned friend the Lord Chancellor has delivered. I agree with it and merely add a few words as your Lordships are differing from the Court of Appeal.

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The Board of Referees have embodied their decision in a case stated for the opinion of the court and have made it for present purposes subject to two questions of law. I disregard the first question which is now irrelevant. As to the second question, which is whether there was evidence to support the board's finding that the appellant company had not within a reasonable time distributed a reasonable part of its income for the periods in question, that is a question of law which depends on an analysis of the facts found in the special case, but I think it cannot properly be disposed of without considering the other question which is logically prior though postponed in the order in which the case is stated. That latter is, in truth, a question as to the onus of proof, and can only be understood by referring to para. 24 of the case. I understand that paragraph to mean that the board are treating the onus as of an ambulatory or shifting character so that at a certain stage of the inquiry it finally shifts from the respondent to the appellant. I think that is wrong in law. The Crown set out to prove that the direction of the board is justified because the appellant company has not distributed a reasonable part of its income within the meaning of s. 21 of the Finance Act, 1922. It is obvious that the section is penal in character, and, in my opinion, the onus is finally on the Crown to prove its right to impose what is a very severe penalty. At the end of the day it is for the Crown to establish the facts necessary to show want of reasonableness on the part of the appellant company. I cannot discover in the case as stated that there are facts found sufficient to justify the conclusion, nor do I think that the board would have come to their conclusion if they had not taken the view as to onus expressed in para. 24. It was for the Crown to establish that the appellant company could have produced funds (it being accepted that the contract with the bank was not unreasonable), out of which to declare a dividend "without jeopardising the interests of the company "or without making it impossible to acquire the shares which "it desired to buy." I accept this here as a correct statement of what would have been sufficient if established. The board have not found that this has been proved. It seems to me that their conclusion in para. 25 was based on their view as to the onus of proof. If the board were wrong in that view, and I think they were, it follows that in law there was no evidence to support their finding of fact in para. 25.

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LORD PORTER. My Lords, I agree that this appeal should be allowed and I think I can state with brevity my reasons for coming to this conclusion.

The case stated ends by asking certain questions for the opinion of the court, questions which, as a result of the present appeal, it is now incumbent on your Lordships to answer. As regards the first, I agree with the Lord Chancellor in thinking that it would not have been a breach of contract for the company to distribute a dividend despite the fact that it had already assigned all its income to the bank to repay the loan obtained and had also hypothecated the whole of its assets for that purpose. Reference has already been made to the *Montague Burton* case (1), which establishes this proposition. In view of this opinion the alternative suggestion that it was not reasonable for the company to make such a contract becomes immaterial, but I should not consider it material in any case. A company is entitled to manage its own business in its own way; the question for the Board of Referees is not, as I see it, whether the company has taken a reasonable course but whether, the particular course having been taken, the company has distributed a reasonable part of its actual income. In saying this, I do not rule out the possibility that it may be seen in a particular instance that no genuine transaction has taken place, and that the bargain made, actual or purported, is really a subterfuge adopted to avoid the payment of tax. I am not saying that such a state of affairs should not be taken into consideration in determining whether a reasonable part of a company's income has or has not been distributed. Moreover, I agree with the noble Viscount and with the board that the decision in *Glazed Kid, Ld.* v. *Inland Revenue Commissioners* (2) is open to the objection that it appears to assume that a dividend, at any rate in the case of a holding company, can only be paid out of income received or receivable as cash. The fact that the income had been invested or hypothecated for some purpose elsewhere would not of itself necessarily prevent the distribution of a dividend. Subject to the qualification that the opinion of the Board of Referees as to the reasonableness of the contract entered into is in this case an immaterial consideration I should answer the first question asked by the case in the affirmative.

There is, however, as I think, more difficulty in answering the second question. As I understand the framework of the case the deductions and inferences drawn by the board from the history of the transactions set out in the earlier paragraphs are brought to a conclusion in para. 24, and therein are to be found the grounds from which it is determined that a reasonable distribution of income had not been made. Those reasons are, I think, as follows: (1.) The appellant company is an investment company. (2.) It held income-producing investments which cost 18,000*l*. (3.) Having those investments, it should have managed its business in such a way as to insure that the company enjoyed the income produced by them either directly or indirectly. (4.) The company had not proved that it could not have kept this income without endangering its interests and without preventing itself from purchasing the shares acquired by means of the loans from the bank. (1.) The appellant company is, indeed, an investment company, and I suppose it is possible to say that in such a case the necessity for building up considerable reserves may not be so imperative as in the case of a trading company. At any rate the board was entitled to think so even in the case of a company holding somewhat speculative shares. But this circumstance seems to have little bearing on a case where the putting by of reserves does not come in issue, but only the making of a speculative but profitable investment. (2.) and (3.) Nor does it seem to me of much assistance to say that the company once held and, subject to the bank's interest, still holds investments costing 18,000*l*. The question is what distributable revenue those investments do or ought to produce. The statement in its bald form appears only to be another way of saying that the purchase of the additional shares ought either not to have been made at all or, at any rate, ought not to have taken the form it did, and seems to merge in allegation (4.), namely, that it had not been proved impossible to acquire those shares in some other way. (4.) To say that it would have been possible to raise the loan required on less onerous terms without any suggestion as to how it could have been done or whence the money could have been obtained is indeed to enter the realm of conjecture. In fact, the money was raised by loan from the bank and in fact the bank insisted on the terms agreed. Indeed, so far as the evidence is concerned, it was anxious to have the total sum repaid at an earlier date than that finally stipulated. If, then, positive evidence is required to support the finding in para. 25 of the special case that the appellant company had not distributed a reasonable portion of its income, I can find none. So far as the bank is concerned it is negatived, and so far as any other source is concerned it is merely conjecture. Indeed, as I think, para. 24 depends, and having regard to the form of the case stated depends solely, on the assumption that the onus of proof is on the company to show, not that it could have raised money to pay a dividend after making the bargain into which it had entered, but that it could have made a better bargain.

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(1) 105 L. J. (K. B.) 236.

(2) 15 Tax Cas. 445.

If the finding in the case had been that the appellant company could, and should reasonably, have raised money or credit on the equity of redemption of the assets pledged to the bank and so provided funds sufficient to declare a dividend, or even that it would have been reasonable to raise the money in this way and the appellant company had not shown they could not do so, I should have hesitated in differing from the Court of Appeal. But that is not how I understand the board to have reached the result arrived at. It is the bargain with the bank of which they complain, not the failure of the company once that bargain was made to obtain such funds as would enable it to distribute a dividend. If the contract with the bank had not been, as it obviously was, a genuine transaction, but only a matter of avoiding tax, or if it had been found that the directors of the company could, and as reasonable business persons should, have borrowed on the security of their equity of redemption, or even that, as reasonable business persons, they should have done so if they could, and it had not been shown that they could not, I should be unwilling to vote for allowing the appeal. But there is no such finding and I do not think that the respondent's case is strengthened by a suggestion that quite a small sum should have been raised for the purpose. The question is what should reasonably have been done. If it was possible and reasonable for the appellant company to borrow at all in the present case, I think the facts found would support the inference that a considerable sum could have been borrowed just as readily as they would support the inference that a small one should have been borrowed. But I do not think they support either. The appellant company's duty is to act reasonably, not to adopt any and every means to scrape up enough money to declare a dividend, however small.

It will be seen that the opinion which I have expressed is based on the exact findings of the Board of Referees as I understand those findings. May I add that it would assist a tribunal, to which a case stated is referred, if the facts found were carefully separated from the inferences of fact and law based on them, and if those inferences themselves were clearly distinguished. In *Bomford* v. *Osborne* (1) I expressed the view that in setting out a case it was not legitimate, after stating the facts, to reach a certain conclusion by saying that such and such a thing is found as a fact. I am still of this opinion, and think that the final conclusion is not a fact but an inference from facts previously set out, and that, therefore, that conclusion is not binding on the tribunal to which the case is referred unless it appears from the previous findings that there are facts which support it. In the present case I cannot find such support and would allow the appeal.

Solicitors for appellant: *Biddle, Thorne, Welsford & Barnes, for Charlesworth, Wood & Brown, Skipton.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1942] A. C. 14.

[PRIVY COUNCIL.]

J. C.*
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Aug. 5.

FRANCE FENWICK TYNE AND WEAR COMPANY, LIMITED . . . . APPELLANTS;

AND

H.M. PROCURATOR GENERAL . . . RESPONDENT.

"THE PRINS KNUD."

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE AND ADMIRALTY DIVISION (IN PRIZE).

Shipping — Prize — Civil salvage — Recovery of remuneration for services—Equitable jurisdiction of court.

A claim for remuneration in respect of civil salvage services rendered to a vessel before her seizure in prize, with the result that the vessel has been saved and the seizure effected, is enforceable in the Prize Court in the exercise of its equitable jurisdiction.

The Aquila (1798) 1 C. Rob. 37; *The Chateaubriand* (1916) 2 Br. & Col. P. C. 69; and *The Gothland* (1916) 5 Ll. P. C. 39, discussed, and *The Aquila* (supra) held to be an authority that the Prize Court has jurisdiction to make awards for civil salvage on

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* *Present:* Viscount Simon L.C., Lord Thankerton, Lord Wright, Lord Porter and MacKinnon L.J.

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enemy goods as well as for military salvage and civil salvage on recaptured goods.

Dictum of Story J. in *United States* v. *Wilder* (1838) 3 Sumn. 308, 318, approved and applied.

Appeal from decision of Lord Merriman, P. [1941] P. 39, allowed, but on other grounds.

APPEAL (No. 36 of 1941) from a judgment of Lord Merriman P. sitting in prize (1), whereby he refused to make any order on a summons taken out by the appellants asking that the Crown be ordered to proceed to adjudication and to have the steamship *Prins Knud* condemned as prize so as to enable the appellants' claim in respect of salvage services rendered to the ship before her seizure in prize to be adjudicated on.

The following facts are taken from the judgment of the Judicial Committee. The *Prins Knud*, a Danish vessel, registered at the port of Copenhagen, ran aground in February, 1940, in the neighbourhood of Holy Island. Denmark was then neutral. The appellants, who were a British company carrying on their business at Newcastle-on-Tyne, were the owners of three tugs which rendered very meritorious salvage services ending successfully, with the result that on March 27, 1940, the vessel, which had been saved from the shoals, rocks and winter storms of that dangerous coast, was moored in safety in the Tyne where she was placed in dry dock in the hands of ship repairers. The appellants as salvors never had exclusive possession. The vessel was never abandoned, and never was a derelict. She had on board at all material times her master, chief engineer and donkeyman. The appellants entered into negotiations with the Danish owners for the settlement of their claim, but before those could be concluded Denmark, on April 9 and 10, 1940, was invaded and completely occupied by the Germans. On April 11, 1940 (the vessel being then in the hands of the ship repairers), the appellants issued a writ in rem in the Admiralty Division of the High Court of Justice in its instance jurisdiction against the vessel and her Danish owners, claiming remuneration for the salvage services which they had rendered. On the same day the writ was served on board and the vessel was arrested. Later in the day, while the vessel was in the custody of the Admiralty Marshal, His Majesty's Collector of Customs and Excise, acting on behalf of the Crown, took possession of the vessel as enemy

(1) [1941] P. 39.

property. On April 12, 1940, a writ in prize was issued by the Procurator General addressed to the owners and parties interested in the ship *Prins Knud* and the goods laden therein for the condemnation of the ship and goods as prize. The Crown decided to requisition the ship, and on April 19, 1940, the Procurator General, acting under O. XXIX., r. 5, of the Prize Court Rules, 1939, which applied to a requisition by the Crown under the order, gave an undertaking in writing to pay into court on behalf of the Crown such amount as might be fixed by the court in respect of the value of the vessel, at such time or times as the court should declare by order that the same or any part thereof was required for the purpose of payment out of court. On April 20, 1940, the registrar of the Admiralty Court ordered the *Prins Knud* to be forthwith released and delivered to the Crown without appraisement. The vessel was thereupon released and requisitioned by the government. Under r. 7 of O. XXIX. proceedings in respect of a ship requisitioned were to continue notwithstanding the requisition. On April 26, 1940, the appellants entered an appearance in the prize proceedings, and also entered a caveat against release. That caveat was still in force. They also registered their claim in accordance with a notice issued by the Ministry of Shipping. On July 8, 1940, judgment was given in the Admiralty Court for 6500*l.* and costs in the action for salvage initiated by the appellants, but it was directed that execution of the judgment should stand over until after the proceedings in prize. In those proceedings, on August 29, 1940, the Danish owners of the *Prins Knud* entered an appearance. On November 4, 1940, the appellants filed their claim in the prize proceedings to be remunerated for their salvage services, and asked for an order that the Crown should pay into court, in accordance with the undertaking given, a sum sufficient to satisfy their claim. On November 19, 1940, the appellants applied by summons that the Crown by its proper officer should proceed to adjudication, or for such other order as would enable their claim to be adjudicated on. On February 11, 1941, Lord Merriman, P., having adjourned the summons into court, refused to make any order. He gave a judgment, stating his reasons for so doing. He was influenced, he said, against making an order to compel the Crown to bring the case to adjudication, by a declaration made in court by the Attorney-General that considerations of high policy had induced the government to decide that as at present advised they

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did not intend to seek a decree of condemnation of the ship or other Danish ships similarly situated. It was not suggested that the requisition of the vessel was not properly made in accordance with the principles laid down by the Privy Council in *The Zamora* (1). He was of opinion that payment to the appellants would not, in any event, be made before the end of the war, and that no advantage to them would be gained by having their rights determined, though he was prepared presently to decide their rights if they so desired. They, however, insisted on their application, and appealed to His Majesty in Council.

At the hearing before the Board it was mutually agreed between the parties that their Lordships should decide only the question of law whether the appellants' claim to remuneration for civil salvage services was enforceable in prize proceedings, the Crown agreeing to pay the amount of the claim, which was not in dispute, if the question was answered in the affirmative. It, therefore, became unnecessary for their Lordships to express any opinion on the course adopted by the President.

1942. Mar. 23, 24, 27; June 4, 5, 8. *Pilcher K.C.* and *Porges* for the appellants. The appellants are in the circumstances of this case entitled to recover in the Prize Court remuneration for salvage services to which admittedly they would be entitled in the Admiralty Court. The position with regard to salvage claims in prize appears to be peculiar. Cases on military salvage hardly help, this being a case of civil salvage, and there has been only one case in which the Prize Court has ordered the payment of civil salvage and then no argument was addressed to the court: *The Chateaubriand* (2). The Prize Court will entertain claims based on liens which arise under the general international maritime law. Claims for freight have always been entertained by the Prize Court, although it might be difficult to bring them within the first general proposition, because, even though no direct contract is made for payment of a specific amount of freight, claims would always be based on implied contract and would not arise out of the general maritime law. Secondly, the Prize Court will recognize a claim if it arises from services which renders possible condemnation of the thing to be condemned, and also on the ground that the shipowner has conferred a benefit on the goods which resides in the goods themselves. The right to

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(1) [1916] 2 A. C. 77.

(2) (1916) 2 Br. & Col. P. C. 69.

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recover salvage is quite independent of contract, although many salvage services are rendered under contract: Kennedy on the Law of Civil Salvage, 3rd ed., pp. 3, 5, 56. General average and salvage are closely allied, and for the nature of a claim for general average see Arnould on Marine Insurance, 12th ed., ss. 906, 907. In the circumstances of this case the only three types of claim cognizable in the Prize Court are freight, general average, and salvage, and they are quite independent of the particular type of lien which they confer on the holder. The Crown contends that "a lien on a ship for salvage, unlike a lien "on cargo for freight, is not a possessory lien." That is wrong. Fundamentally, a salvor has a possessory lien: Kennedy on The Law of Civil Salvage, 3rd ed., pp. 8, 9. The salvor is entitled to retain possession of the ship as against the whole world, including the true owner, if it is reasonably necessary to do so to enforce his security. With regard to the authorities, *The Tobago* (1) appears to show that in 1804 the Prize Court would entertain claims for freight. *The Hoffnung* (2) seems to indicate that in 1807 there was a practice in the Prize Court to recognize a claim for general average. [*The Belvidere* (3) was also referred to.] *The Frances* (*Irvin's Claim*) (4) seems to enunciate for the first time by way of antithesis the distinction between liens which arise under the general mercantile law and liens which are dependent on contract. Attention may also be drawn to *The Nigretia* (5), a Japanese case, which purported to deal with salvage. [Reference was also made to *The Marie Glaeser* (6), *The Ariel* (7), and *The Odessa* (8).] *The Sorfareren* (9) appears to be the first reported case of a claim in respect of general average being allowed in prize, and it may be stressed that a general average loss is one incurred for the general benefit of ship and cargo to which all interests must contribute rateably. [Reference was also made incidentally to *Cleary* v. *McAndrew* (10).] The position with regard to freight is very clearly summarized in Colombos on the Law of Prize, 2nd ed., pp. 44, 289. *The Juno* (11) was the leading case on freight in the last war.

(1) (1804) 5 C. Rob. 218.
(2) (1807) 6 C. Rob. 383.
(3) (1813) 1 Dods. 353.
(4) (1814) 8 Cranch 417.
(5) (1904) 2 Russ. & Jap. P. C. 208.
(6) [1914] P. 218.
(7) (1857) 2 E. P. C. 600.
(8) [1915] P. 52; [1916] 1 A. C. 145.
(9) (1915) 1 Br. & Col. P. C. 589.
(10) (1863) 2 Moo. P. C. (N. S.) 216.
(11) [1916] P. 169.

[VISCOUNT SIMON L.C. *The Friends* (1) is helpful on the principle underlying the question of freight.]

The Corsican Prince (2) does not directly help, but it was there said that " the Prize Courts have constantly dealt with " claims for freight." It cannot be contended on principle, however, that the matter is settled. In the present case much importance is not attached to the fact that the appellants' claim carries a maritime lien. Finally, in *The Chateaubriand* (3) the decision, at any rate, is in favour of the appellants. Summarizing, (*a*) the Prize Court administers international law on equitable principles, and for that reason entertains claims against enemy property seized and condemned where such claims are founded on general mercantile law, and a claim for salvage is so founded. (*b*) If the award of compensation in respect of freight cannot be justified under (*a*), such compensation is awarded by the Prize Court on equitable principles to an innocent shipowner who has benefited the goods condemned, or is responsible for bringing the res to the place of capture. (*c*) A claim for salvage is justified whether under (*a*) or (*b*) above. It was solely due to the fact that the appellants had executed work and incurred expenditure in and about the salvage of the *Prins Knud* that the vessel was preserved as a physical entity, and the appellants' maritime lien in respect of their services, therefore, represents an interest of the appellants directly and visibly residing in the substance of the vessel herself, and the captors have themselves been directly benefited by the services of the appellants. The reasoning employed by the Prize Court in allowing claims by shipowners to be paid freight and to be reimbursed in respect of general average expenditure out of the proceeds of cargo condemned in prize supports the appellants' contention that they are entitled to recover salvage in the present proceedings.

Sir Donald Somervell A.-G. and *J. V. Nesbitt* for the Crown. With the exception of *The Chateaubriand* (3) there is no case and no record or reference by way of example of a salvage claim being enforceable in prize. With regard to liens, a certain amount of confusion may arise from the failure to distinguish between possessory and non-possessory liens. The ordinary maritime lien is not a possessory lien, whereas in our ordinary common law terminology when " lien " is used a possessory lien is meant. A maritime lien is not one which is

(1) (1810) 2 E. P. C. 48.

(2) [1916] P. 195, 202.

(3) 2 Br. & Col. P.C. 69.

founded on possession: Halsbury's Laws of England, 2nd ed., vol. xxx., p. 948. My argument is based to a considerable extent on emphasizing the importance of the distinction between maritime and possessory liens. The mere existence of a maritime lien is not conclusive. The two cases where there is some authority for a claim in prize are general average and freight, but when the authorities are examined it will be found that the admission of both those claims is based on possession and the existence of a possessory lien. The general average cases are *The Sorfareren* (1), *Cleary* v. *McAndrew* (2), and *The Hoffnung* (3). The actual decision in the last cited case does not directly assist, but the way in which Sir W. Scott deals with it does, for, it is submitted, he dismissed the claim primarily because it cannot be said that a cargo owner ever has in average claims a possessory lien as against the ship. The first of the freight cases was *The Tobago* (4) where there was the first clear statement of the basis of the rule under which the owner of a neutral ship is given freight on enemy goods which are taken from the ship, and it is submitted that it was based on the possessory lien which would have been exercisable if the ship had reached its destination. When *The Frances* (*Irvin's Claim*) (5) is examined, it fits in with the way in which the matter was put in *The Tobago* (4), and the way in which, it is submitted, those authorities have to be construed. In *The Prosper* (6) it was held that the right to freight is not extrinsic. [*The Carlos F. Roses* (7) was also referred to.] In the later cases the earlier authorities, like *The Tobago* (4), *The Prosper* (6), and *The Frances* (5), in which, it is submitted, the reference to the right to freight was based on the existence of the possessory lien, were all before the court and approved. There is no sentence in the judgments that can be picked out reaffirming the possessory lien principle, but it was clearly before the court and certainly was not dissented from. The right view is that the courts were confronted with this principle, recognized for a very long time with regard to freight, and based on a possessory lien, and were then adjusting it to certain special cases, but there is no reason to suppose that they were in any way intending to dissent from the basis on which the principle had stood in the earlier cases: *The Marie Glaeser* (8)

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(1) 1 Br. & Col. P. C. 589.
(2) 2 Moo. P. C. (N. S.) 216.
(3) 6 C. Rob. 383.
(4) 5 C. Rob. 218.
(5) 8 Cranch. 417.
(6) (1809) 2 E. P. C. 25.
(7) (1900) 177 U. S. 655.
(8) [1914] P. 218.

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and *The Odessa* (1). The claimant must first establish that he would have been able to exercise a possessory lien. He is then in a position to show that the captor has got the benefit, and he may get his freight. If the cargo is contraband, he will not do so. *The Aquila* (2) does not appear to help. *The Juno* (3) adapts the principle of freight to British ships. In *The St. Helena* (4) it was said that " it is no part of the function of the " Prize Court to alter the contractual relations between ship- "owner and cargo owner." The Prize Court only recognizing possessory liens, how far can it be said that a salvor, not having a possessory lien in the ordinary sense, might be said to have a sort of potential possessory lien ? The salvor of a derelict ship would have a possessory lien. The *Prins Knud* was not a derelict. It was said in *Cossman* v. *West* (5) that " In the " case of salvors there is a distinction between a derelict and "a vessel which . . . . has not been abandoned . . . . when "the master remains in command he retains the possession of "the ship." And Kennedy on The Law of Civil Salvage, 3rd ed., p. 10, citing from Dr. Lushington in *The Lady Worsley* (6), says : "I cannot conceive that there could be "any rule more mischievous to commercial contracts at large, "and to the property salved, than that it should be held that, "under whatever circumstances, it was the duty of the salvors "to retain the property." See also note (*p.*) on p. 9 of Kennedy, citing *The Glasgow Packet* (7). The expression " maritime "lien" broadly means that class of claim which entitles one to go to a court and arrest the ship. The fact that there has been an arrest, that a writ has been issued, is not, however, a material circumstance, for the vessel is held by the court for those whom it decides are ultimately entitled to it. In *The Tergestea* (8) it was made clear that a necessaries claim could not be enforced in prize. The fact that the claimants there had had the ship arrested did not put them in any sense in a preferential position with regard to the enforcement of their claims. There is no indication in any prize case that it has ever been regarded as a relevant circumstance that a claimant has had the ship arrested in the exercise of his maritime lien. If *The Gothland* (9), which is rather like *The Chateaubriand* (10),

(1) [1916] 1 A. C. 145.
(2) (1798) 1 C. Rob. 37.
(3) [1916] P. 169.
(4) [1916] 2 A. C. 625, 630.
(5) (1887) 13 App. Cas. 160, 181.
(6) (1855) 2 Spinks, 253, 255.
(7) (1844) 2 W. Rob. 306, 312–3.
(8) (1915) 2 Ll. P. C. 149, 162.
(9) (1916) 5 Ll. P. C. 39.
(10) 2 Br. & Col. P. C. 69.

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where salvage was allowed without argument, is right, it does not help very much, because it would make the salvage claim, at any rate at the relevant stage, based on a possessory lien. The only claims enforceable against the captor are those in respect of which there was before capture a possessory lien.

Pilcher K.C. in reply. The Crown's right of capture is paramount, but the Prize Court has on certain equitable principles allowed claims in respect of freight and general average. The appellants have here a claim recognized by international law, to which is attached a remedy recognized by that law and the general mercantile law of nations, they have preserved the res for the captor, and acting on principles which have already been laid down in decided cases this Board should entertain their claim and should declare that in this case they are entitled to the award of salvage out of the fund in court.

Aug. 5. The judgment of their Lordships was delivered by Lord Wright, who stated the facts, and continued: The question which their Lordships have to decide is whether the appellants have a claim enforceable in prize in respect of the salvage services which they rendered to the *Prins Knud* before her arrest in prize. In the circumstances to be explained the question has been argued without technicalities, both parties desiring a decision of the fundamental question. The President in his judgment was exercising, as he indicated, a special discretion in the peculiar circumstances of the case. It is clear that he was not meaning to throw any doubt on the long established rule that the captor "is "strictly enjoined both by his instructions and by the Prize "Act to proceed immediately to adjudication." So the rule was stated by Sir William Scott and Sir John Nicholl in 1794, as quoted at p. 7 in Pratt's edition, published in 1854, of Mr. Justice Story's authoritative summary of the principles and practice of prize courts which formed note II. to Wheaton's Reports, vol. i. In the last war the same rule was again restated by this Board in *The Zamora* (1): "If the captors do not "promptly bring in the property seized for adjudication, the "court will at the instance of any party aggrieved compel "them so to do." This duty of the Crown as captor attaches as soon as the vessel is seized as prize. Their Lordships have thought it desirable to enunciate this old principle clearly,

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(1) [1916] 2 A. C. 108.

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though they are satisfied that the President was not casting any doubt on it. Nor do they apprehend that he was shaping his decision in any way on the particular policy of the government, instead of on the principles of international law to which the court is bound to give effect. The very practical arrangement arrived at in the course of the present hearing by the parties, with the approval of their Lordships, renders any discussion of the President's actual order unnecessary.

The Attorney-General suggested that their Lordships should hear and decide the question of law whether the appellants had a good claim in prize, and undertook that, if it were decided that they had a good claim, he would not oppose an order for payment into court of the amount of the claim, which was not disputed, to be followed by an order for its payment out to the appellants. Mr. Pilcher, on behalf of the appellants, agreed to that course being taken. The parties also agreed, subject to their Lordships' approval and consent, that their Lordships should themselves hear the case without sending it back to the President. This had the effect of depriving their Lordships of the benefit of the President's opinion on the question of law, but in the war conditions prevailing it was decided to forgo the advantage of the President's ruling. In that way the expense and delay of a double hearing of what was inevitably a lengthy discussion of a difficult question of law were avoided. The owners of the vessel were duly notified of the course proposed, and by their solicitors in this country have disclaimed any intention to intervene. The substantial question thus comes for decision whether civil salvage is recoverable in prize for meritorious services rendered by salvors before the seizure of the prize with the result that the vessel has been saved and the seizure effected. The appellants do not here claim a possessory lien, but they say that they have a maritime lien in virtue of which they arrested the ship and placed it in the custody of the Admiralty Court, in its instance jurisdiction, before it was seized in prize. They claim that the Prize Court (a term which is adopted in this judgment to describe the Admiralty Court while exercising its jurisdiction in prize as distinguished from the Admiralty Court while exercising its instance jurisdiction) has jurisdiction to make awards or grant compensation to claimants in certain circumstances, that this jurisdiction extends to the salvage services here in question, and that, if the exercise of the jurisdiction is discretionary, that discretion ought in the present case to be exercised in favour of the claimants. They do not rest their claim on the Crown's bounty, but on their legal status as persons entitled to claim before the Prize Court. Their claim, as has been pointed out, is not complicated by technical objections which might otherwise have had to be considered, but which the Crown has waived by the agreement already described. The Crown, in effect, has relied on the principle, baldly stated on one occasion in the Supreme Court of the United States by Nelson J., delivering the opinion of the court in *The Battle* (1), to be too well settled to require examination—the principle, that is, that "capture as prize of war, jure belli, overrides all "previous liens." The Crown contended that the only exceptions, or apparent exceptions, to this rule are those cases in which the claimant has a possessory lien and is deprived of that possessory lien by the seizure, as, for instance, in the case of freight on enemy goods captured on a neutral vessel under international law as it operated before the Declaration of Paris, or on neutral goods released from an enemy ship which had been condemned as prize, or in the case of claims by a ship for general average contribution from cargo which had benefited by the sacrifice and in respect of which the ship had a possessory lien for the cargo's contribution. Thus, it was said, the appellants must fail here on any view because they had no possessory lien, and could not set up in the Prize Court a maritime lien, even a lien of so high a rank in the hierarchy of liens as that which appertains to salvage.

Such a conclusion seems to involve a reversal of the principles recognized and applied, whether in the maritime law or in the common law, but it is said to be justified when due attention is given to the peculiar jurisdiction exercised by a Prize Court in which the supreme question is "prize or not prize." A Prize Court is not concerned with the rights of individuals inter se, like a court of common law or maritime law. In Lord Stowell's words, referring to the captor in *The Tobago* (2): "His rights of capture act upon the property, without regard "to secret liens possessed by third parties." By "secret" Lord Stowell is not meaning concealed or disguised liens, but merely (as he puts it a few lines earlier) that they are not interests "directly and visibly residing in the substance of the "thing itself" (3) where the "onus is immediately and visibly

(1) (1867) 6 Wall. 498.

(2) 5 C. Rob. 218, 223.

(3) Ibid. 222.

"incumbent upon it" (1) for instance, as he puts it, where the owner of the ship has the cargo in his possession, subject to his demand for freight by the general law independent of all contract. "But," he continues, "it is a proposition of a much "wider extent, which affirms that a mere right of action is "entitled to the same favourable consideration, in its transfer "from the neutral to a captor" (2). As Lord Mansfield said in his famous judgment in *Lindo* v. *Rodney*, reported in a note to *Le Caux* v. *Eden* (3): "By the law of nations, and treaties, every "nation is answerable to the other for all injuries done, by sea or "land, or in fresh waters, or in port. Mutual convenience, "eternal principles of justice, the wisest regulations of policy, "and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. Every "country sues in these courts of the others, which are all "governed by one and the same law, equally known to each." The law administered in a Prize Court is thus not the law of the country in which it is situated, but the law of nations, and furthermore, the scope and object of prize jurisdiction are different from those of civil jurisdiction. Prize is not a civil or marine cause. In Lord Mansfield's words (4): "The whole "system of litigation and jurisprudence in the prize court is "peculiar to itself: it is no more like the court of Admiralty "than it is to any court in Westminster-Hall." On the same page he also observed that "the court of Admiralty is called the "*Instance* court; the other the *Prize* court." He pointed out that the manner of proceeding is entirely different according as the claim is made in one court or the other. Lord Mansfield's historical survey is limited in the main to the records of the seventeenth century, but more recent research has gone further back. Reference may in particular be made to a learned article by Mr. R. G. Marsden in The English Historical Review, xxiv., 675, on Early Prize Jurisdiction and Prize Law in England, and another article on the same subject in 15 L. Q. R. 353. That author observes that the Admiral's Court had no existence before the middle of the fourteenth century, and that continuous records did not begin until nearly two centuries later, and that there was no distinction between instance and prize jurisdiction until the middle of the seventeenth century. The need for a prize tribunal became urgent, he says, about the middle of the fifteenth

(1) 5 C. Rob. 218, 222.
(2) Ibid. 223.
(3) (1781) 2 Doug. 594, 613, 615.
(4) Ibid. 614.

century. Special tribunals had been established by treaties early in that century to deal with piracy and prize. It was directed that their procedure should be speedy and informal, and judgment was to be given on the merits of each case. Thus was presaged the peculiar system of the practice of the Prize Court which proceeds on the ship's papers and the preparatory examinations, and, if further proof or plea and proof should be necessary, acts on affidavit evidence, and only resorts to oral evidence if the judge so orders. This is still the essential feature of the modern procedure in the Prize Court, even in the more complicated issues of fact which come for decision under the rules of contraband and the doctrine of continuous voyage. Affidavit evidence is still the normal method of proof as appears from the Prize Court Rules of 1939, in particular O. XV.

All this shows that in approaching questions of prize law the principles of the common law or of the maritime law, the latter of which was founded on the civil law, are not to be regarded as governing in the Prize Court. In particular, liens, even maritime liens, which bulk so largely, for obvious reasons, in the maritime law, are no longer sacrosanct. As a rule, liens, even though arising under the law merchant or sea law, will not as such be regarded in prize unless they are treated as entitled to consideration not specifically as liens but because they indicate special claims to the sense of equity and fairness on which the court acts. In the same way, liens or rights arising under municipal law or under contracts will not be enforced by the Prize Court. This is what Lord Stowell indicated in *The Recovery* (1) when he said (2): "It is to be "recollected, that this is a court of the law of nations, though "sitting here under the authority of the King of Great Britain. "It belongs to other nations as well as to our own; and what "foreigners have a right to demand from it, is the adminis-"tration of the law of nations, simply, and exclusively of the "introduction of principles borrowed from our own municipal "jurisprudence."

A short citation of some of the decisions which illustrate these principles will explain their character. The citations may begin with the reports of Sir Christopher Robinson, afterwards a judge of the High Court of Admiralty. A writer in the Law Magazine for August and November, 1833, after observing that Dr. Robinson had drawn back the veil of the

(1) (1807) 6 C. Rob. 341. (2) Ibid. 348–9.

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Temple "from the oral traditions or secret writings of the "Talmudists," went on to say that "the six volumes of "Reports which he published have high intrinsic merits of "their own, and contain the ipsissima verba of Sir William "Scott. It is reported that he was most fastidious in the "correction of his judgments, extending his revising care to "the substitution of colons for semicolons, and to the nice "poising of particles." There is, then, no justification for the suggestion made in argument that it is doubtful whether these reports represented what Lord Stowell had said, or whether they merely represented what Christopher Robinson thought he had said. The famous case of *The Tobago* (1) dealt with the claim of a British merchant on a bottomry bond given fairly in time of peace to relieve a French vessel, which Lord Stowell said was a contract regarded with great attention and tenderness "by this court" (2), meaning, their Lordships think, the High Court of Admiralty. "But can "the court," he asked, "recognize bonds of this kind as titles "of property, so as to give persons a right to stand in judgment, "and demand restitution of such interests in a Court of Prize ? " . . . . The person advancing money on bonds of this nature, "acquires by that act no property in the vessel ; he acquires "the jus in rem, but not the jus in re, until it has been converted "and appropriated by the final process of a court of justice. " . . . . If there is no change of property, there can be no "change of national character . . . . A captor who takes "the cargo of an enemy on board the ship of a friend, takes "it liable to the freight due to the owner of the ship ; because "the owner of the ship has the cargo in his possession, subject "to that demand by the general law, independent of all "contract. . . . . These are all characters of the jus in re— "of an interest directly and visibly residing in the substance "of the thing itself" (2). The nature of a bottomry bond given under pressure of necessity in a foreign port was later described by Lord Stowell, sitting in the Admiralty Court in *The Rhadamanthe* (3), as a species of hypothecation which gives a maritime lien, but was held in *The Tobago* (1) not to give any right in prize. The doctrine of *The Tobago* (1) has been followed and applied in a long series of decisions in prize. It was applied by the Supreme Court of the United States in *The Frances* (*Irvin's Claim*) (4) to a claim for a lien for

(1) 5 C. Rob. 218.
(2) Ibid. 221–223.
(3) (1813) 1 Dods. 201.
(4) 8 Cranch. 417.

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advances. The difficulty was there emphasized that the doctrine of lien depends chiefly on the rules of jurisprudence established in different countries, and the court quoted with approval the language of Lord Stowell in *The Tobago* (1) that the right of the captor acted on the property without regard to secret liens possessed by third parties, "secret," that is, in the sense that they depended on the mere private contracts of individuals. In *The Ariel* (2) the Privy Council applied the same principles, and it was laid down in general terms that liens, whether in favour of a neutral on an enemy's ship or in favour of an enemy on a neutral ship, should equally be disregarded. The enemy interest in the neutral property cannot be condemned, nor can the neutral interest in the enemy property claim to be exempt from condemnation. In more recent times the most far-reaching illustration of these principles is afforded by the refusal of Prize Courts to recognize the special property or interest of British or neutral pledgees of bills of lading in respect of shipments of goods the general property in which was in the enemy. So it was held by the Supreme Court of the United States in *The Carlos F. Roses* (3) and in the British Prize Court by Sir Samuel Evans P. in *The Marie Glaeser* (4), and by the Privy Council in *The Odessa* (5). It was there said that in "determining the national "character of the thing seized the courts in this country have "taken ownership as the criterion, meaning by ownership the "property or dominium as opposed to any special rights created "by contracts or dealings between individuals, without "considering whether these special rights are or are not, "according to the municipal law applicable to the case, "proprietary rights or otherwise" (6). The Board also rejected the argument that, as the pledgees held the bills of lading, they had an interest arising out of that possession which a Prize Court should recognize just as it recognizes the carrier's possessory lien for freight. It was observed that the possession of the bills of lading or other documents of title was merely constructive or symbolical. The observation may here be interposed that, on a similar line of reasoning, the appellants cannot be taken to have obtained possession, either constructive or actual, of the *Prins Knud* by securing the arrest of the vessel by the Admiralty Marshal. The vessel was thereupon in the custody of the Admiralty Court, not in the possession of the party merely because he procured the arrest.

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(1) 5 C. Rob. 218.

(2) (1857) 11 Moo. P. C. 119.

(3) 177 U. S. 655.

(4) [1914] P. 218.

(5) [1916] 1 A. C. 145.

(6) Ibid. 154.

The principles laid down in the authorities just cited seem to negative the idea that a maritime lien can in itself give a claim against the captor of a ship in the Prize Court. Maritime liens hold an honoured place in the maritime law as enforced in the Admiralty Court. That form of remedy is particularly important in a court like the Admiralty Court which is largely concerned with foreign litigants. The maritime lien enables the res to be made available to enforce the liability, though it also impleads the owners personally. In modern times, questions relating to maritime liens have been fully discussed, particularly in *The Parlement Belge* (1), *The Dictator* (2) and *Compania Naviera Vascongado* v. *S.S. Cristina* (3). The true nature of a maritime lien, which differs from a common law or possessory lien in that it does not depend on possession but attaches to the property into whatsoever hands it goes (*The Bold Buccleugh* (4)), was also well defined by that great lawyer, Lord Gorell (then Gorell Barnes J.), in *The Ripon City* (5) as being "a privileged claim upon a vessel in respect "of service done to it, or injury caused by it, to be carried "into effect by legal process. It is a right acquired by one "over a thing belonging to another—a jus in re alienâ. It is, "so to speak, a subtraction from the absolute property of the "owner in the thing" (6). Lord Gorell is here using the term "jus in re" in a different sense from that in which Lord Stowell used it in the passage cited above. The latter applied the term jus in rem to a right requiring to be carried into effect by legal process, whereas a jus in re was to him, primarily at least, a right depending on possession of the thing. In the Prize Court what is material is the absolute or general property which gives the thing its national character. A right subtracted from that property of the type which is often described as a special property, or, more precisely, a special interest, not visible or tangible, does not affect the captor's rights. Lord Stowell's opinion is categorical on this point and has been often repeated. Later judges have taken the same view. Thus the Supreme Court of the United States in *The Hampton* (7) stated the rule in reference to a mortgage.

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(1) (1880) 5 P. D. 197.
(2) [1892] P. 304.
(3) [1938] A. C. 485.
(4) (1851) 7 Moo. P. C. 267.
(5) [1897] P. 226.
(6) Ibid. 242.
(7) (1866) 5 Wall. 372.

The material passage of that judgment is quoted by Sir Samuel Evans P. in *The Marie Glaeser* (1): "' In proceedings in "' prize, and under principles of international law, mortgages "' on vessels captured jure belli are to be treated only as liens, "' subject to being overridden by the capture, not as jura in re, "' capable of an enforcement superior to the claims of the "' captors.' " Miller J. in *The Hampton* (2), in delivering the judgment of the court, pointed out that any other rule would tend materially to destroy the right of prize capture in time of war. In substance, the reason is that the captor could never know that the thing he was seizing was enemy property, because, if such liens or special interests were recognized, the effect would be that enemy property in part, or even in whole, might be granted immunity in favour of mortgagees or lien holders, and the enemy or the neutral exposing his goods to the risk of capture under international law would pro tanto be saved from the risk of loss.

It does not, however, necessarily follow that maritime liens, such as liens for salvage, would be governed by the same principles as are applied in the case of mortgages, bottomry bonds and the like. The latter depend on the private contracts of individuals and their effect under the appropriate municipal laws, whereas the lien for salvage depends on the general maritime law. This distinction was emphasized in *The Tobago* (3), *The Odessa* (4), and elsewhere. Here again, however, a difference may be noted. The maritime lien for damage (established by the Privy Council in *The Bold Buccleugh* (5) in 1851) would not, it seems, qualify for recognition in the Prize Court for any purpose, since, apart from its being a modern lien, it is a claim ex delicto, and the lien is merely a more convenient remedy for enforcing a cause of action which, though enforceable against the ship, is primarily personal. On the other hand, the circumstance that the lien has been acquired for services rendered to the prize of so meritorious and so valuable a character that but for them the capture would never have been made, is not in itself necessarily a sufficient ground to secure recognition of the claim in the Prize Court. Thus in *The Hoffnung* (6), captors in right of the cargo, which had been condemned, claimed general average contribution against the ship in respect of part of the cargo

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(1) [1914] P. 218, 234.
(2) 5 Wall. 372.
(3) 5 C. Rob. 218.
(4) [1916] 1 A. C. 145.
(5) 7 Moo. P. C. 267.
(6) 6 C. Rob. 383.

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sold in order to pay for the repair of the ship at an earlier stage of the voyage before the seizure. Lord Stowell dismissed the claim. He said (1): "Cases of average on the part of "the ship against the cargo are not unfrequent, but a demand "of the cargo against the ship is perfectly novel in this court. "The distinction is obvious. The right of war is a right in re, "and the court . . . . attends only to the res ipsa, and the "onera attaching on the property in right of possession. "The ship has the possession of the cargo, which the master "is not bound to deliver, till he has been satisfied for his "demand of average, if he has such, in the same manner as "for his demand of freight. He has the res ipsa in his possession, and may legally detain it." He also took a further point, which was that the goods sold had ceased to be cargo before the seizure. "Unless," he said (2), "it can be shown, "that the hand of capture was employed on these goods in "quality of cargo, the court cannot go back to affect them in "any other character." He concluded "that the debt, if it "was to be so called, due from the vessel to the owner of the "cargo, is amongst those onera which the Prize Court does "not notice" (3). He rejected the idea that, if the vessel had been seized, the captors would have been liable even if the whole cargo had been disposed of in a foreign port to enable the ship to proceed, and thus the captors of the vessel would have had the benefit of the conversion of the cargo. Such benefit did not make the sacrifice an onus proper to receive effect and be recognized in the Prize Court. It was possession of the cargo which was thus taken to be the test of an onus visibly residing in the res. So in the case of freight. In *The Prosper* (4) Lord Stowell, dealing with the right of the captor of a ship to freight on the cargo on board, upheld that right under the international law prevailing in days before the Declaration of Paris. "The right to freight," he said (5), "is not extrinsic. The master is not bound to "establish his right by a proceeding at law; he has possession "of the cargo, and has a right to retain that possession till "his demand is satisfied; and this forms a material distinction "from those other rights, in which the intervention of a court "of justice is required. It is just the same with respect to "the obligations of the vessel; if one of these ships had been

(1) 6 C. Rob. 384.
(2) Ibid. 386.
(3) Ibid. 387.
(4) (1809) Edw. 72.
(5) Ibid. 77.

"in a private dock, for the purpose of being repaired, the "Crown could only have made the seizure, subject to the "detainer for repairs." Such seems to have been the case of *The Vrow Sarah*, reported in a note to *The Belvidere* (1), though that case was also put on the bounty of the Crown, and the view both of the government and the court that not to give the repairers the expenses of the outfit of the vessel just before the seizure would be a harsh measure.

These and other cases which seem to place the whole emphasis on possession might seem to support the Crown's contention that, since salvage does not necessarily involve a possessory lien, the Prize Court should disregard it, even though the lien ranks so highly that by maritime law it needs no support from possession: *Eleanora Charlotta* (2); and, indeed, may be prejudiced if a salvor improperly retains possession in order to maintain his lien. The lien for salvage is a maritime lien of the highest rank and priority, postponed to other liens only in rare cases as, for instance, to liens for subsequent salvage or subsequent damage and a few others. It is a lien based on the benefit conferred on the owner of the property, but "salvage is not governed merely by a regard "to benefit received, but also on grounds of public policy by "a due regard to the interests of commerce and humanity," to quote Lord Gorell in *The Veritas* (3). It does not follow that, because capture overrides all liens, the Prize Court has no jurisdiction to reward salvors. The Prize Court is a court exercising an equitable jurisdiction. Lord Stowell, dealing with a case of freight on capture and recapture, where the voyage had not been completed because the port of destination was closed by blockade so that there was what a modern lawyer would term a frustration of the adventure, observed that the court had to provide as well as it could for the relation of interests which had unexpectedly taken place under a state of facts out of the contemplation of the parties and had to discover what was the relative equity between the parties. It may be that the true reason for the allowance of freight was not so much the technical reason that the owner had a right of possession as a sense of fairness and equity. The practice of captors of cargo paying freight to neutral shipowners was regularly established in the sixteenth century (Marsden, loc. cit.), and the main reason seems to have been

(1) 1 Dods. 353, 355.
(2) (1823) 1 Hagg. Adm. 156.
(3) [1901] P. 304, 313.

to avoid bearing too heavily on neutrals by the enforcement of belligerent rights. This was clearly stated by Lord Stowell in *The Prosper* (1): "In this court it is held, that where neutral "and innocent masters of vessels are brought into the ports "of this country, on account of their cargoes, and obliged to "unliver them, they shall have their freight, upon the principle "that the non-execution of the contract, arising from the "incapacity of the cargo to proceed, ought not to operate to the "disadvantage of the ship. This rule was introduced for the "benefit of the shipowners, and to prevent the rights of war from "pressing with too much severity upon neutral navigation." This is a more intelligible principle, as well as one justified by history, for the allowance of freight. Since the Declaration of Paris such questions are not likely to arise except in regard to carriage of contraband or in regard to enemy goods shipped before the outbreak of war on British ships as in the case of *The Juno* (2), in which Sir Samuel Evans P. ordered that such a sum should be allowed for freight as was fair and reasonable in all the circumstances. He observed (3): "While there "are no rules of law or decisions to bind or guide the court, "the problems can, I think, be solved without great difficulty "by a rational application of fair and equitable considerations. "The Prize Court has always claimed to exercise equitable "jurisdiction, using that term in its broadest sense, and not "in its more technical Chancery meaning." A similar question came before the Privy Council in *The Prins der Nederlanden* (4). The freight which was claimed by the neutral shipowner in respect of contraband goods was there disallowed. Lord Sumner, in delivering the judgment of the Board, after examining the authorities, held that the court had jurisdiction to allow freight on contraband goods, but that it was a jurisdiction to do what was fair in the circumstances of a given case, and was essentially a jurisdiction which was fair in its exercise. He said (5) that: "when freight is allowed, it is from the "court's view of fair dealing towards parties whose conduct "is not open to blame, [the 'not' is by mistake omitted from "the report] and it is refused in order to protect the effectual "exercise of belligerent rights. Reasons of this kind seem "founded rather in policy and discretion than in legal rule "and legal right." These observations were directed to

(1) Edw. 72, 76.
(2) [1916] P. 169.
(3) Ibid. 173.
(4) [1921] 1 A. C. 754.
(5) Ibid. 760.

questions of the allowance of freight on contraband goods, the carriage of which, though it is within the rights of a neutral, is in a sense open to blame from the point of view of the belligerent as contrary to his belligerent interests, but they state a general principle which can be applied with infinitely greater force to the allowance of salvage in a case like the *Prins Knud.* Such a doctrine overrides the narrow test of mere possession which is proposed by the Crown, even if there were no authority to support it. Civil salvage has always been regarded with great favour in any maritime court. Some characteristics of salvage were stated by Lord Stowell in *The Two Friends* (1): "Salvage is a question of the jus gentium, "and materially different from the question of a mariner's "contract, which is a creature of the particular institutions "of each country, to be applied and construed and explained "by its own particular rules." That was said, it is true, of military salvage, but is equally appropriate to civil salvage. There can be in these cases no difficulty about "secret" contracts depending on the operation of municipal laws. In *The Louisa* (2) civil salvage was awarded by the Prize Court to recaptors in addition to military salvage for the rescue, because the recaptors had rendered salvage services to the vessel to rescue her from dangers of the seas. Lord Stowell said it was a case of civil combined with military salvage: "Under such circumstances, more particularly in cases where, "supposing no military salvage to be due, a claim for civil "salvage alone might with justice have been made, the court "has thought itself at liberty . . . . to give an additional "reward to the salvors as for a separate service." (3). That language, it is true, was used in that case also in reference to a claim by recaptors for additional remuneration for their services in preserving the property from the perils of the sea.

But there is a decision of Lord Stowell which shows that the Prize Court has jurisdiction to award salvage. That is *The Aquila* (4). A ship and cargo had been found derelict at sea. The ship was Swedish, and was restored because Sweden was neutral. The cargo had been shipped at Cadiz. The ship's papers showed Hamburg as the ostensible destination. There was reason to believe that an owner would appear, as there were papers on board describing the cargo to be the property of a neutral owner, but, as Lord Stowell says, "some "suspicions occurred, however, that it was in fact the property "of an enemy; and under these circumstances it became "expedient to proceed against it as prize, for the purpose of "meeting the pretensions of the ostensible neutral owner, ... "where alone it could be properly discussed, in the Prize "Court. These measures were highly necessary, and therefore "no objection can justly be made against the mode of proceeding, which has been pursued in this case on behalf of "the Crown" (1). *The Aquila* (1) was heard in November, 1798. It appeared that the destination was not Hamburg, but Amsterdam. Their Lordships have been able to examine the record of this case through the good offices of Mr. L. F. C. Darby, the registrar of the Admiralty Court, and of the Record Office. The record shows that the proceedings were in prize. A minute of March 9, 1798, recites that, more than a year and a day having elapsed, the cargo was condemned as good and lawful prize and as droits and perquisites of His Majesty in his Office of Admiralty "reserving the question as to salvage." Rothery in his Report on the Droits of the Crown and of Admiralty in time of War reports *The Aquila* at p. 117, and at p. 124 adds a further touch to the story. He quotes the warrant which was issued giving a reward out of the fund to two persons for furnishing information which enabled the authorities to detect the fraudulent covering up of the enemy property. What was done in regard to salvage appears in the report in Robinson. In their Lordships' judgment, the salvage which was allowed was allowed by the Prize Court in the exercise of its jurisdiction and the case is an authority that the Prize Court has the jurisdiction to make awards for civil salvage on enemy goods as well as military salvage and civil salvage on recaptured goods.

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(1) (1799) 1 C. Rob. 271, 278–9.

(2) (1813) 1 Dods. 317.

(3) 1 Dods. 318.

(4) 1 C. Rob. 37.

It may seem strange that there is so little precedent for the exercise of that jurisdiction. In the last war civil salvage on enemy property seized by the Crown was awarded by the Prize Court in two cases as a matter of right, not of bounty. One was *The Chateaubriand* (2), where Sir Samuel Evans P. held that salvors of German ships should be allowed salvage in respect of the ship which had been salved in the North Sea before it had been seized and condemned as prize. Counsel for the parties who were claiming in prize for the salvage remuneration contended that the same principles which the

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(1) 1 C. Rob. 37, 41.

(2) 2 Br. & Col. P. C. 69.

Prize Court applied to freight and general average should also be applied to salvage. Their Lordships apprehend that the principles referred to were to allow a fair and reasonable remuneration on grounds of equity. Counsel for the Crown left the matter to the court, and the court ordered payment of the salvage reward. But it is impossible to credit that Sir Samuel Evans P. would have made the order if he had not thought that sitting in the Prize Court he had jurisdiction to do so. A very similar course was adopted in *The Gothland* (1). It was stated in the argument of the present appeal by counsel for the Crown that many claims for civil salvage on goods condemned as prize were dealt with out of court by allowance of salvage by the Crown in exercise of its bounty, the exercise of which was held in *The Odessa* (2) and the *Zamora* (3) not to be affected by modern legislation. Even in the present war a case was referred to of an Italian steamer, the *Amelia Lauro*, which was arrested and condemned as prize, and in respect of which the Crown paid salvors their claim for salvage as an act of grace. There was, however, there a fund, the proceeds or value of the vessel, out of which the payment could be made. Counsel in argument stated that in practice bounty payments of this character were not made unless there was a fund available. The case of the *Amelia Lauro* differs in this respect from that of the *Prins Knud* as things stand.

There is, undoubtedly, a scarcity of authority on a matter which must often have called for decision. Apart from the practice of bounty payments, the scarcity of reported authority may well be due to the fact that such claims were dealt with as a matter of course by the court in the exercise of its long established jurisdiction to deal with all accessorial matters in regard to property brought into prize, or it may be that captors in the old days settled any salvage claims before the property was brought into court, or perhaps all reasons may at one time or another have concurred. But, however that may be, such authority as there is vindicates a general jurisdiction to award salvage. Their Lordships, in coming to this conclusion, may well quote the language of that great judge, Story J., in *United States* v. *Wilder* (4). That was a case of general average. He quoted observations of Lord Stowell in *The Waterloo* (5)

(1) 5 Ll. P. C. 39.
(2) [1916] 1 A. C. 145.
(3) [1916] 2 A. C. 77.
(4) (1838) 3 Sumn. 308.
(5) (1820) 2 Dods. 433.

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on the question of salvage, which Lord Stowell described as "a right otherwise universally allowed, and highly favoured "in the law, for the protection of those who are subjected to it; "for it is for *their* benefit that it exists under that favour of "the law. It is what the law calls *jus liquidissimum,* the "clearest general right that they who have saved lives and "property at sea should be rewarded for such salutory "exertions" (1). Story J. then said of the right to general average (2): "If there ever was a case which ought to be settled "by a court of justice, upon principles of right and liberality, "this is precisely that case. No court of justice ought to "decline to enforce it, unless there be some clear, definite, and "uncontrovertible prohibition against the exercise of it." He clearly meant that exactly the same might be said of salvage, rightly, in their Lordships' judgment. These expressions are as applicable to the prize as to the instance jurisdiction of the Admiralty Court. They give the true justification for the allowance of salvage and general average in prize.

In the result, their Lordships are of opinion that this appeal should be allowed, and the order of the Prize Court, dated February 11, 1941, discharged with costs. It should be declared that, if the *Prins Knud* were condemned as prize, the appellants would be entitled to recover from the Crown remuneration for the salvage services rendered to the ship by the appellants before seizure. The Crown consenting, it ought to be ordered that the agreed sum of 6675*l.* 2*s.* 7*d.* in respect of salvage services and the costs of the salvage proceedings ought to be paid into court by the Crown for payment out to the appellants in satisfaction of their claim in these proceedings. They will so humbly advise His Majesty. The Crown will pay the costs of this appeal.

Solicitors for appellants: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

Solicitor for respondent: *The Treasury Solicitor.*

(1) 2 Dods. 435–6.

(2) 3 Sumn. 318.

AR RISKS ASSOCIATION, LD. [1948] A. C. 243 *Considered.* HESKELL *v.* CONTINENTAL EXPRESS, LTD. [1950] 1 All E.R. 1033.

Applied. HOWGATE *v.* BAGNALL [1951] 1 K. B. 265

[HOUSE OF LORDS.]

H. L. (E.)*

1942

Feb. 2, 3, 5, 6; *May* 19.

YORKSHIRE DALE STEAMSHIP COMPANY, LIMITED . . . . APPELLANTS;

AND

MINISTER OF WAR TRANSPORT . . RESPONDENT.

Insurance (Marine)—War risk—Warlike operation—Stranding—No negligence—Shipowners entitled to recover for war risk.

A ship requisitioned by the Minister of War Transport was insured by the owners against marine risks. While sailing in convoy and admittedly engaged in a warlike operation, namely, the conveyance of war stores, the ship stranded. There was no improper or negligent navigation on the part of the ship, the stranding being due to a variety of causes, including a deviation of course under naval orders to avoid apprehended submarine attack, coupled with an unexpected set of the tide:—

Held, that the proximate cause of the stranding was a warlike operation.

The proximate cause of the loss of a ship is not necessarily the one which operates last, but is the effective and predominant cause, selected from among co-operating causes. This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. An accident of a kind which arises from a marine risk may in some circumstances be regarded as the consequence of a warlike operation, but, because a ship is employed on a warlike operation, everything that happens to her is not necessarily a proximate consequence of it. A marine risk does not become a war risk merely because the conditions of war make it more probable that the marine risk will operate.

Decision of the Court of Appeal [1942] 1 K. B. 35 reversed.

APPEAL from the Court of Appeal (1).

The facts stated by VISCOUNT SIMON L.C. and LORD WRIGHT were as follows: The appellants were the owners of the motor vessel *Coxwold*, which was requisitioned by the respondent, the Minister of War Transport, on September 7, 1939, on the terms, accepted by the appellants, of the charterparty Form T99 A and Form T773. The effect of these documents was to leave with the appellants the responsibility of insuring the vessel "except as otherwise provided" and the excepting provision was as follows: "The risks of war which are taken by "the charterer are :—(*a*) Those risks which would be excluded "from an ordinary English policy of marine insurance by the "following, or similar, but not more extensive clause: "'Warranted free of capture, seizure, arrest, restraint, or "'detainment and the consequences thereof or of any attempt "'thereat, also from the consequences of hostilities or warlike "'operations, whether there be a declaration of war or not, "'civil war, revolution, rebellion, insurrection or civil strife "'arising therefrom or piracy'; (*b*) loss of or damage to the "ship hereby chartered caused by: (i.) hostilities, warlike "operations, civil war, revolution, rebellion, insurrection or "civil strife arising therefrom; (ii.) mines, torpedoes, bombs "or other engines of war." It was agreed that, as between the appellants and the respondent, the effect of these provisions was equivalent to saying that the respondent had insured the *Coxwold* against risks of war as defined.

**Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD MACMILLAN, LORD WRIGHT and LORD PORTER.

(1) [1942] 1 K. B. 35.

On the morning of May 7, 1940, at about 2.45 A.M., the *Coxwold* stranded near the Damsel Rocks on the west side of the Isle of Skye. The *Coxwold* was in a convoy of four merchant vessels, formed near Rothesay on May 6, at about 2.30 A.M., in charge and under the orders of a naval officer and guarded by four destroyers. No navigation lights were being shown except that two vessels as leaders carried dimmed and shaded stern lights. The convoy was proceeding at a speed of about 9 knots. The *Coxwold* was one of two "following" vessels, the other (to starboard of the *Coxwold*) being the *Balzac*. The *Coxwold* was carrying a cargo of petrol in tins from Greenock to Narvik, Norway, for the use of His Majesty's forces and was thus admittedly engaged in a warlike operation, such warlike operation being the proceeding from one war base to another with military stores for the use of British forces in the field. The night of May 6–7 was not clear, visibility was poor, and at times there were heavy rain squalls. The general course of the convoy on the night in question was through the Hebridean Sea in a north-easterly direction, making to pass through the Little Minch with the Isle of Skye to starboard. Under the orders of the naval officer in charge, the convoy was zigzagging throughout, and at 7.5 P.M. on May 6, the course was set north-east by north magnetic. At about 7.15 P.M. the naval officer ordered an alteration to be made of four points to starboard and immediately afterwards another alteration of four points to starboard to avoid what was thought to be an enemy submarine. No subsequent correction appeared to have been made for this considerable deviation to starboard. At about 7.45 P.M. the course north-east by north was, under the orders from the naval officer, resumed, but zigzagging continued. About midnight the second officer, a competent seaman, took over the watch. At about 1.25 A.M. on May 7, the *Coxwold*, owing to the poor visibility, gradually lost the shaded stern light of her leading ship, the reflection of which in the water she had been following, but she kept her course till about 2.30 A.M., ceasing to zigzag and attempting to pick up the convoy. At this time she again altered course to starboard (about quarter-point) to pass through the lights of some approaching vessels, which were afterwards found to be the leading and escorting vessels of the convoy retracing their course for a reason which the arbitrator considered unexplained. The course of north-east by north was then again resumed, but at about 2.45 A.M. broken water was seen ahead and almost at once the *Coxwold* struck and grounded on the Damsel Rocks though the engines had been put full speed astern. The other "following" vessel, the *Balzac*, also grounded at about the same time to the southward of the *Coxwold*, i.e., in her correct convoy station. She came off at about 3 A.M. and rejoined the convoy. Later she left the convoy and proceeded to Scapa escorted by a destroyer.

Before the arbitrator, Sir Robert Aske K.C., it was contended, on behalf of the respondent, that the accident to the *Coxwold* was not proximately caused by a warlike operation, but that it was due to negligent navigation by those on board. The arbitrator found that there was no improper navigation of the *Coxwold*. The special case on this point stated: "I find that there was no improper navigation of the *Coxwold*. On the evidence before me, including "that of the commanding officer of one of the naval escort "ships, I find that the course set for the convoy appeared to "be a safe one. It was accurately followed by the *Coxwold*, "but there was an unexpected and unexplained tidal set "which carried the *Coxwold* some miles to the eastward. The "Neist Light was not being shown at full brilliancy as usual "during fog and reduced visibility, and this set could not be "detected by those on board the *Coxwold*. . . . . There was "nothing to indicate to the second officer that the vessel was "not on a safe and proper course or that the course or the "speed of the vessel should be altered. . . . . I find that the "stranding of the *Coxwold* was not due to negligence of those "on board." The arbitrator's conclusion was thus expressed: "If and in so far as it is a question of fact, I find that in the "above circumstances the loss in question was the direct "consequence of the warlike operation on which the *Coxwold* "was engaged." The arbitrator, accordingly, made an interim award in favour of the appellants which was affirmed by Viscount Caldecote C.J. The Court of Appeal reversed this decision and the appellants appealed to the House of Lords.

Miller K.C. and *A. J. Hodgson* for the appellants. Prima facie the stranding of a ship is within a policy of marine insurance as a peril of the sea, but then the question arises whether, looking at the totality of the circumstances, it falls within the exceptions. This involves investigating two questions: (1.) Was a warlike operation in progress? (2.) If so, was it the proximate (i.e., the direct or immediate) cause of the stranding? In the present case the first question is answered by the admission that the ship was proceeding from one war base to another with petrol for His Majesty's forces. As to the second question, if a ship is engaged on a warlike operation all damage suffered by it is prima facie proximately caused thereby, and the onus of proof lies on those seeking to displace the presumption by showing that the loss was solely caused by another peril. That must be found as a fact: *Clan Line Steamers, Ld.* v. *Board of Trade* (1). In every case it is necessary to review all the circumstances and to decide what was the dominant cause of the loss. The fact that the ship is in the last resort lost by a peril of the sea does not exclude the fact of loss by a warlike operation. The totality of the circumstances which, operating together, caused the stranding of this ship includes the facts (1.) that she was engaged on a warlike operation; (2.) that she was sailing in convoy at night under the orders of a naval officer, the ships being unlighted; (3.) that by the orders of the naval officer she was deflected from the course set her to avoid an apprehended enemy submarine; (4.) that she was proceeding in the dark in conditions of bad visibility through a strait in which the shore lights had been dimmed. The arbitrator found that the loss was the direct consequence of a warlike operation and the question is one of fact: see Halsbury's Laws of England,

(1) [1929] A. C. 514.

2nd ed., vol. xviii., p. 305. [They referred to *Britain Steamship Co., Ld.* v. *The King* (*The Petersham*) and *Green* v. *British India Steam Navigation Co., Ld.* (*The Matania*) (1); *John Cory & Sons* v. *Burr* (2); *Ionides* v. *Universal Marine Insurance Co.* (3); *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (4); *S.S. Larchgrove* (*Owners*) v. *The King* (5); *Attorney-General* v. *Ard Coasters, Ld.* (6); *Charente Steamship Co., Ld.* v. *Director of Transports* (7); *Clan Line Steamers, Ld.* v. *Board of Trade* (8); *Board of Trade* v. *Hain Steamship Co., Ld.* (9).]

Sir William Jowitt S.-G. and *Cyril Miller* for the respondent. The loss of this vessel was by a marine risk. It is not enough for the appellants to show that it happened in the course of a warlike operation, or that a warlike operation was one of its contributory causes: *Clan Line Steamers, Ld.* v. *Board of Trade* (10); and the fact that a marine peril is rendered more acute by reason of war conditions does not turn it into a war risk. The stranding in the present case was prima facie due to a sea peril, and the appellants must prove affirmatively that in the particular circumstances it was not due to a sea peril but was the direct result of warlike operations. On the facts as found by the arbitrator the stranding was due to the fact that the ship was taken far from her course by an unexpected and unexplained tidal set. But for that she would not have stranded. The mere fact that a ship is in a particular place because of a war does not make her loss the result of a warlike operation: *Ionides* v. *Universal Marine Insurance Co.* (11). For the purposes of stranding there is really no distinction between a warship and any other, save where the character of the vessel really enters into the circumstances of the operation on which it is engaged. The arbitrator in this case nowhere criticizes the course set by the naval officer in command of the convoy. [They referred to *Britain Steamship Co., Ld.* v. *The King* (12).].

Miller K.C. replied.

(1) [1919] 2 K. B. 670, 692; [1921] 1 A. C. 99.

(2) (1883) 8 App. Cas. 393, 397.

(3) (1863) 14 C. B. (N. S.) 259.

(4) [1918] A. C. 350, 353, 361.

(5) (1919) 36 T. L. R. 108.

(6) [1921] 2 A. C. 141, 152.

(7) (1921) 38 T. L. R. 148.

(8) [1928] 2 K. B. 557; [1929] A. C. 514.

(9) [1929] A. C. 534.

(10) [1928] 2 K. B. 557, 569, 570, 571; [1929] A. C. 514.

(11) 14 C. B. (N. S.) 259, 286.

(12) [1919] 2 K. B. 670, 699, 701; [1921] 1 A. C. 99, 120, 121, 130, 134.

The House took time for consideration.

1942. May 19. VISCOUNT SIMON L.C. My Lords, this is an appeal from the order of the Court of Appeal reversing the judgment of Viscount Caldecote C.J. who affirmed an interim award in favour of the appellants made in an arbitration between the parties by Sir Robert Aske K.C. subject to a special case stated by the learned arbitrator. In the Court of Appeal, Luxmoore L.J. (1) thought it was plain that the arbitrator had found that the proximate cause of the stranding of the *Coxwold* was this unexpected and unexplained tidal set. With great respect to the learned lord justice, I do not so read the special case. The finding as to the tidal set is introduced in connection with the issue whether those on board the *Coxwold* were guilty of negligence. There is no finding that the tidal set was the proximate cause of the stranding. Reading the findings in the case as a whole, I deduce that the arbitrator's view was that, though the tidal set would have brought the vessel nearer to the land than she would otherwise have been, it was the combination with this of the alteration of course, ordered for the avoidance of an enemy submarine and persisted in for half an hour without subsequent correction, which was the effective explanation of the disaster.

There are a number of decisions of this House, arising out of the application to particular facts during the last war of the provisions of charterparty T99 in its then form, to which we have to look for illumination on this matter. The decisions themselves, and any propositions of law necessarily involved in arriving at the decisions are binding on us, though there may be expressions of opinion not essential to the decisions which we are free to re-examine. It has been laid down that a vessel like the *Coxwold*, which was carrying munitions of war from one war base to another, is "engaged in a war-like "operation," and this was expressly admitted by the respondent in the present case. This, however, is an entirely different thing from saying that any and every accident which happens to such a ship during her voyage is the consequence of a warlike operation. To suggest the contrary would be just as illogical as to say that if a postman, while engaged in the operation of delivering letters, meets with an accident in the street, this is necessarily the proximate consequence of his delivering letters. Authority is hardly needed for the proposition that you do not prove that an accident is "the consequence "of" a warlike operation merely by showing that it happened "during" a warlike operation. For example, if a commercial vessel, while proceeding from one war base to another with munitions on board, is destroyed while at sea by accidental fire, the cause of which is quite unconnected with the nature or method of her journey or the nature of the cargo she carries, I should suppose that it could not be said that her destruction was proximately caused by her warlike operation. So with collision. Scrutton L.J. is plainly right when he says in *Clan Line Steamers, Ld.* v. *Board of Trade* (1), that "the "question to be decided is: Was the collision a consequence "of a warlike operation—not, did it happen in the course of "a warlike operation, not, is a warlike operation one of the "events which in their totality contributed to the collision, "but was the collision a consequence of a warlike operation in "the sense in which that expression is understood in insurance "matters?" If Lord Dunedin's use of the syllogistic form in *Attorney-General* v. *Ard Coasters, Ld.* (2), were to be understood as stating that anything that happens during a warlike operation is a consequence of it, that passage contains a slip in reasoning and is no essential part of the decision. Lord Sumner, in *Attorney-General* v. *Adelaide Steamship Co., Ld.* (*The Warilda*) (3), puts the true test when he asks whether the collision is caused "effectively and proximately" by the warlike operation.

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(1) [1942] 1 K. B. 35, 48.

Before referring to other decisions of this House which bind us, I would call attention to the exact question raised by the terms of the charterparty in the present case. The relevant contrast is not, strictly speaking, between marine risks and war risks. The *Coxwold* accidently stranded, that is to say, she was proceeding through the sea when the water under her bottom became too shallow to keep her afloat and she consequently ran aground. No misfortune could be more marine in its nature than this, but the question here is not whether this was a marine risk, but whether, granting that stranding is a marine risk, this stranding is not to be regarded as "the consequence of warlike operations." That, in my opinion, depends on whether, in the practical sense in which a policy of insurance must be interpreted and applied, the "dominant" or "determining" cause of the disaster was warlike operations. The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for "*the* cause" involves a selection of the governing explanation in each case. The cause of the death of a human being may, I suppose, be scientifically stated to be the failure of the supply of sufficient oxygen to the brain, but when a medical man certifies "the cause of death" he looks for the thing which has predominantly operated to bring death about. In such a case as the present it is this sort of practical test which has to be applied, always bearing in mind that the proximity of the cause is insisted on by s. 55 of the Marine Insurance Act, 1906, but bearing in mind also that the proximate cause is not necessarily the one which operates last. We thus have to steer our way between two propositions, neither of which is itself correct. It is not correct to say that, because a vessel is engaged in a warlike operation, therefore everything that happens to her during her voyage is proximately caused by a warlike operation or is a proximate consequence of a warlike operation. Neither is it correct to say that because the accident is of a kind which arises from a marine risk (e.g., stranding or collision) therefore the particular accident can in no circumstances be regarded as the consequence of a warlike operation. The truth lies between these two extremes. It seems to me that there is no abstract proposition, the application of which will provide the answer in every case, except this: one has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of that accident may be. It is well settled that a marine risk does not become a war risk merely because the conditions of war may make it more probable that the marine risk will operate and a loss will be caused. It is for this reason that sailing without lights, or sailing in convoy, are regarded as circumstances which do not in themselves convert marine risks into war risks, but where the facts, as found by the judge, establish that the operation of a war peril is the "proximate" cause of the loss in the above sense, then the conclusion that the loss is due to war risk follows.

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(1) [1928] 2 K. B. 557, 567.
(2) [1921] 2 A. C. 141, 152.
(3) [1923] A. C. 292, 305.

The previous decisions of the House on this subject appear to me to support this view of the matter. In *British India Steam Navigation Co., Ld.* v. *Liverpool and London War Risks Insurance Association* (the *Matiana* case) (1), a majority of

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(1) [1921] 1 A. C. 99.

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the learned Lords then sitting considered that the loss of a merchant ship proceeding under convoy and subject to the orders of the naval officer in charge, which took an unusual course and ran on a hidden reef, was not the proximate consequence of a warlike operation. Viscount Cave and Lord Shaw dissented, thinking that the orders of the naval officer were the direct and determining cause of her loss, but we must take our guidance from the proposition affirmed by the House. It is instructive to turn to the opinion of Lord Wrenbury (who, with Lord Atkinson and Lord Sumner, constituted the majority) and to contrast two passages which bring out the distinction to be observed, so far as the question is a question of law. He said (1): "If the operation relied "upon as a warlike operation is one which creates no new risk, "but only aggravates or increases an existing maritime risk "by removing something which, but for the war, would have "been a safeguard against the risk, then the risk is not a "war risk." and he referred to the well-known decision in *Ionides* v. *Universal Marine Insurance Co.* (2), as an illustration. Lord Wrenbury went on to point the contrast. He said (3): "If here submarines had been sighted and the escorting vessel "had ordered a notoriously dangerous course in order to avoid "a peril of war—namely, submarine attack—and in consequence the vessel had gone on the rocks, the case would, "I think, have been different." The point at which a "new "risk," as distinguished from an "aggravated" old risk, arises is not precisely indicated in the above passages, and, indeed, its determination largely involves a conclusion of fact derived from the particular circumstances, but in the present case, where the finding is that so substantial a deviation from the normal course was ordered for the express purpose of avoiding an enemy submarine, and was not subsequently corrected, there is no reason for saying that the learned arbitrator, in finding that the loss was the direct consequence of a warlike operation, was disregarding what had been already laid down by this House. In the *Warilda* case (4), Lord Sumner approved the dictum of Roche J. in *Charente Steamship Co., Ld.* v. *Director of Transports* (5), that where "an "essential and necessary part of the direct and immediate "cause of a loss was a warlike operation, whether well or

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(1) [1921] 1 A. C. 99, 135.
(2) 14 C. B. (N. S) 259.
(3) [1921] 1 A. C. 99, 136.
(4) [1923] A. C. 292, 305.
(5) 38 T. L. R. 148, 149.

"ill-conducted, the loss was the consequence of hostilities."

I differ from the conclusion reached in the Court of Appeal, not for any reason of abstract law, but largely because of a different reading of the facts found by the arbitrator as constituting the cause of the loss. MacKinnon L.J. truly observes that a merchant vessel engaged on a warlike operation, if overwhelmed by a storm which would have equally damaged her whatever she was engaged in doing, suffers a loss by perils of the seas, and that this is not the consequence of warlike operations, but when the lord justice proceeds to inquire what facts there are in the present case which could establish that the stranding was proximately caused by a warlike operation, he omits to mention that to avoid an enemy submarine the *Coxwold*, under naval orders, turned at right angles to her normal course and continued in this direction for half-an-hour. It seems to me, as it did to the Lord Chief Justice, that this fact, combined with all the other circumstances, is enough to support the arbitrator's conclusion that the stranding was the consequence of warlike operations, and we have no right to reverse this conclusion unless the facts found by him cannot support it. I move that the appeal be allowed with costs here and below.

LORD ATKIN (read by Lord Wright). My Lords, I have had the advantage of reading the opinions about to be delivered by my noble and learned friends, Lord Wright and Lord Porter, and I so entirely agree with them that I should find it unnecessary to add even a few words were we not differing from the Court of Appeal. I have had to express my opinion on the topics raised in this case on various occasions during and after the last war, and I am glad to find from the opinions of my noble friends that there is nothing which I need substantially alter. I will only say that the cases cited by them and the propositions enumerated by Lord Porter which are firmly established by authority make it useless for any court in these days to seek afresh to reason the matter out. Rightly or wrongly nearly every question that can arise on the controversy between marine and war risk has been settled to the great convenience of the shipping world, if not with the approval of all their advisers. If the warlike operation includes the direction of the war vessel through the water from one war starting point to another war destination, it seems to remain true that almost every casualty to a ship during such an operation will be the consequence of a war operation. Not all, for there may be circumstances of accident on board or the result of wind and wave that may not come within the definition, though I should find it necessary to know all the facts relating to a suggested accidental fire or a suggested great wave before I was able to draw the line. But if in the course of a warlike operation the direction of the ship's course against another ship is a consequence of a warlike operation: *Attorney-General* v. *Ard Coasters, Ld.* (1) it is surely impossible to distinguish the case where the course of the ship is directed against a rock and this whether negligently or without negligence, and whether the ship is deflected by tide or current or wind. I do not myself think that in the present case the determining factor is the change of course to avoid submarine danger. I am myself quite unable to understand the suggested navigation—how, after half-an-hours' steaming due east, the navigator only resumed his former course, or how, being on that course, he observed the lights of the returning convoy on his starboard bow. But it seems to me unprofitable to seek an explanation, or again to raise the questions of proximate cause which were obviously within the consideration of the learned Lords who decided the numerous cases referred to. I think that the learned arbitrator and the Lord Chief Justice came to the right conclusion, and that this appeal should be allowed and the order of the Lord Chief Justice restored.

LORD MACMILLAN (read by Lord Porter). My Lords, The existence of a state of war obviously exposes shipping to abnormal risks in addition to the ordinary perils of navigation. Loss arising from those risks in the case of a requisitioned ship may fairly be said to be for the national account and to form an appropriate subject of compensation from public funds. This is recognized in the form of charterparty known as T99A applicable to ships requisitioned by the Minister of War Transport which incorporates from form T773 certain provisions whereby the minister takes the "risks of war," which are "the consequences of hostilities or warlike operations," and assumes liability for loss or damage to the chartered ship "caused by hostilities, warlike operations" and certain other vicissitudes. For perils other than those the risk of which is thus expressly undertaken by the minister the shipowner covers himself by his ordinary marine insurance policy.

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(1) [1921] 2 A. C. 141.

This division of liability has given rise to many perplexing cases in which the minister, on the one hand, and the shipowner or his insurers, on the other hand, have been at issue whether a particular casualty was due to warlike operations or to the ordinary perils of navigation, each naturally seeking to place the casualty in the category for which the other is under liability. The minister accepts the position that he must be treated as if he had granted a marine insurance policy covering the risks which he has undertaken. Consequently, under s. 55 of the Marine Insurance Act, 1906, he is liable for any loss proximately caused by warlike operations. The adverb "proximately" does not greatly assist the solution of the problem, but it at least serves to emphasize that it is the predominant and determining cause that is to be sought.

I have had the advantage of reading in advance the views expressed by the Lord Chancellor as to the proper approach to the question raised in the present appeal, and I find myself so entirely in accord with these views that I have very little to add. No formula can be devised which will provide a universal touchstone for the infinite variety of circumstances which may arise. Each case must be judged in the light of its own facts and by resorting, not to the refinements of the philosophical doctrine of causation, but to the commonplace tests which the ordinary business man conversant with such matters would adopt. It is agreed that the *Coxwold*, when she ran aground on the coast of Skye, was engaged in a warlike operation, but to place liability on the minister it is not enough that the casualty arose in the course of a warlike operation. It must also arise out of and be proximately caused by the warlike operation. The stranding of a ship is a typical marine casualty, but that does not prevent it from being proximately caused by warlike operations. A peril may be at once a maritime peril and a war peril: see the definition of "maritime "perils" in s. 3 of the Act of 1906.

The learned arbitrator has found that the casualty suffered by the *Coxwold* was "the direct consequence of the warlike "operation" in which she was engaged. Your Lordships have, therefore, only to decide whether that conclusion is justified on the facts which the arbitrator has found and set out in the case which he has stated. These facts have been narrated by the Lord Chancellor, and, in my opinion, they justify the arbitrator's conclusion. I think that the ordinary man, if asked what caused the casualty, would reply that it was caused by the vessel, in obedience to orders from the commodore of the convoy, deviating from a safe course in order to avoid a suspected enemy submarine. It is true that there was an unexpected tidal set which contributed to carry the vessel to the eastward, but there is no finding that this tidal set would have caused the stranding apart from the change of the course. Certainly the vessel would not have gone ashore where she did but for the order which she received and obeyed to change her course to the eastward to avoid apprehended enemy action. I accordingly concur in the motion that the appeal be allowed.

Lord Wright. My Lords, The learned arbitrator found, if and so far as it was a question of fact, that in the circumstances the loss was the direct consequence of the warlike operation on which the *Coxwold* was engaged. He made an interim award on liability in favour of the appellants subject to the opinion of the court whether they were entitled to recover on the true construction of T99A and T773 on the facts found by him. This award, which was upheld by the Lord Chief Justice, was set aside by the Court of Appeal. But for that decision I should without more have thought that the case was covered in principle by the decisions given in various collision cases which occurred during the last war. Though this was a stranding, not a collision, I should not have been disposed to regard the difference as material. There was, indeed, a vital distinction laid down in the authorities depending on whether the casualty occured to, or was caused by, a vessel engaged on a warlike operation, but prima facie it would have seemed to me, if the damage was caused by the action of the vessel in executing a warlike operation, it should on the decisions of this House be classed as a consequence of a warlike operation.

Lord Sumner said in *Attorney-General* v. *Adelaide Steamship Co., Ld.* (*The Warilda*) (1), speaking of a collision case: "as each vessel in proceeding to the point of collision "was proceeding on her voyage, and neither had abandoned "either the destination or the purpose of her voyage, it was "part of the operation, in which each vessel was engaged, to "proceed to that point. By admission the *Warilda's* operation

(1) [1923] A. C. 292, 301.

"was a warlike operation throughout, and as was the whole "so were the parts. Steaming into the *Petingaudet* was one "of those parts." The material claim in that case was for the damage sustained by the *Warilda* by running into the other ship. If the Damsel Rocks is substituted in place of the *Petingaudet*, the words and the principle would seem to me precisely applicable. It is as mischievous to steam into a rock or other hard object, as into another vessel. In *Attorney-General* v. *Ard Coasters, Ld.* (1), Lord Finlay, quoted with approval a passage from the judgment in the Court of Appeal of my noble and learned friend Lord Atkin, then Atkin L.J., in the same case. The owners of the *Ardgantock* were claiming compensation from the Crown under the clause in T99 which then corresponded to that in T773. The *Ardgantock* had been run into by a destroyer, *H.M.S. Tartar*, while the latter was on patrol duty. The words of Lord Atkin so quoted which are material to the present inquiry were (2): "The "injury was directly due to the warlike operation of the "*Tartar*, just as it would have been in my view if the *Tartar* "had been herself injured by running into an unlighted wreck "or other peril of the same kind," for instance, I might add, running into the Damsel Rocks. The warlike operation is, as it were, an umbrella which covers every active step taken to carry it out, including the navigation, the course and helm action intended to bring the vessel to the position required by the warlike operation, and that none the less because accident or mischance or negligence leads to stranding or collision. No doubt, a wilful act such as barratry or scuttling would raise different questions.

That, I think, was the view taken by the Lord Chief Justice, but the Court of Appeal came to a different conclusion, though they had before them the authorities to which I have referred. I think I ought to summarize their opinions. Scott L.J. said (3): "I think the fallacy of his [the appellants' "counsel's] seemingly logical argument, is that in the present "case the war character of the vessel's adventure was nothing "more than an irrelevant circumstance, and that there was no "chain—much less a direct link—of causation between that "character and the stranding." MacKinnon L.J. said (4): "And for my part, when damage manifestly caused by perils "of the seas has been sustained, I can see no logic in the

(1) [1921] 2 A. C. 141, 147, 148.
(2) (1920) 36 T. L. R. 555, 557.
(3) [1942] 1 K. B. 35, 42.
(4) Ibid. 46.

"contention that, because the vessel was on a voyage which "was itself a warlike operation, this damage by sea perils "must be deemed to be a consequence of a warlike operation." He adds that he cannot infer from the decisions that when a vessel by reason of her cargo and her voyage is engaged on a warlike operation any damage she sustains by impact with any hard substance is a consequence of warlike operations. The learned lord justice seems to ignore the feature that the impact with the hard substance (ship or rock) was in consequence of the vessel being directed through the water in pursuance of the warlike operation. It is that feature which brings such a case within the ruling of this House in *Attorney-General* v. *Adelaide Steamship Co., Ld.* (1) and constitutes the essential feature of the present case. Luxmoore L.J. expresses a similar view. His opinion is that the arbitrator has found that the proximate cause of the stranding of the *Coxwold* was the unexpected and unexplained tidal set. He says (2): "The only warlike operation on the part of the "*Coxwold* was the carrying of material (i.e. petrol) for war "purposes to a destination in the seat of war, but neither the "fact that the material was required for war purposes nor the "fact that its destination was a war base can have had any "effect on the influence of the unexpected and unexplained set "of the tide on the *Coxwold*. The tidal set would have carried "the *Coxwold* on to the Damsel Rocks whatever her cargo "and wherever her destination, and it is for this reason I think "that the stranding of the *Coxwold* was the direct consequence "of a marine peril, for the warlike operation had no greater "part in causing it than it would have had if the stranding "had been caused by a storm of sufficient force to drive the "*Coxwold* on to the rocks."

These are powerful arguments which are worthy of the most careful consideration, unless they are advanced too late, because excluded, as I think they are, by the line of reasoning pursued in the authorities to which I must now refer in some detail. The material words of the clause are: "Consequences "of hostilities or warlike operations," or, more succinctly, "Consequences of warlike operations." The natural starting point in considering these words is *Ionides* v. *Universal Marine Insurance Co.* (3). That case was decided in 1863, when, it seems, the particular clause was a novelty. As Lord Sumner

(1) [1923] A. C. 292.
(2) [1942] 1 K. B. 35, 51.
(3) 14 C. B. (N. S.) 259.

pointed out in *Britain Steamship Co., Ld.* v. *The King* (1), in that case the words were construed as being subject to the ordinary rule observed in marine insurance that the proximate cause is what is material in deciding if a loss is recoverable. "Consequences" is a compendious description of the perils to be excepted (or included), not a description relating to the loss. As Willes J. said in *Ionides* v. *Universal Marine Insurance Co., Ld.* (2): "The words 'all consequences of "'hostilities' refer to the totality of causes, not to their "sequence." It is true that these words occur in the present and similar cases in a charterparty entered into between the Crown and the owner of the requisitioned ship, but they are to be construed as if they occurred in a policy, because they form part of a contract of indemnity which is, in truth, a contract of marine insurance. Once it is clear, as this House finally held in *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Co.* (3), that "proximate" here means, not latest in time, but predominant in efficiency, there is necessarily involved a process of selection from among the co-operating causes to find what is the proximate cause in the particular case. In the words of Phillips on the Law of Insurance (1867 5th ed., Cambridge, Mass., p. 678): "In case of the concurrence "of different causes to one of which it is necessary [sc. because "of the nature of the contract] to attribute the loss, it is to "be attributed to the efficient predominating peril whether "it is or is not in activity at the consummation of the disaster." This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view. Thus in the *Ionides* case (4) the court held that the cause of the loss was the fact that the captain was out of his reckoning to the extent of about fifty miles when he changed his course and that the extinction of the light was not the cause, though there was a remote chance that if it had been alight, as in peace time it used to be, the stranding might have been averted. The question always is what is *the* cause, not merely what is *a* cause. The cause so ascertained must then be within the description of "consequences of warlike operations" if the shipowner is to recover. MacKinnon L.J. (1) has commented severely on the vague and indefinite nature of the language used, but definition involves limitation. It seems that the clause was, in the first instance, deliberately phrased to cover all the possible varieties of war risk losses. The words are in one sense clear enough. They postulate (1.) loss or damage (2.) due to perils which can be described as consequences of hostilities, to which was later added warlike operations. That last is a wide term. It has been difficult to define its scope and apply it to all the variations and combinations of fact, but the difficulty of construction is no greater than has been experienced in the construction of other documents in other spheres. A contract can be changed if it does not work satisfactorily.

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(1) [1921] 1 A. C. 99, 131.
(2) 14 C. B. (N. S.) 259, 289, 290.
(3) [1918] A. C. 350.
(4) 14 C. B. (N. S.) 259.

The stranding in this case was undoubtedly a peril of the seas, but we must look behind the stranding to ascertain if the cause of the casualty was a peril which could be described as a consequence of warlike operations. It is necessary to examine more closely what these words cover in principle and on the authorities, at least so far as relevant for the matters in hand, in their application to the circumstances of a merchant, not a naval, vessel. There are two main points of view from which this issue may be approached. The hostilities or warlike operation may be the action of the enemy, seeking to capture or to damage or destroy the merchant ship, as by means of bombs, torpedoes, mines or shells, or in consequence of attempts to capture her. That last category is illustrated by some of the instances given by Erle C.J. in *Ionides* v. *Universal Marine Insurance Co.* (2). He takes a case in which the vessel was trapped by the enemy, and, though at the end she was lost by stranding, that came about because she could not escape from the toils. The loss was thus by an attempt at capture and was by a war peril. His further illustration of a vessel shut out by enemy mines from using the customary channel and compelled to take an unusual channel is perhaps different. The channel which Erle C.J. takes for his illustration is one which is a safe exit for a competent seaman, but the ship is lost because of bad navigation. Hence Erle C.J., taking that as the cause, puts the loss as a loss by a sea peril.

But there is a different class more relevant to the present problem, where the casualty is due, not to hostile action, but

(1) [1942] 1 K. B. 35, 43.

(2) 14 C. B. (N. S.) 259, 286.

to the acts of the national or allied armed forces. If the vessel is run down in war time by a friendly warship, even though accidentally, the cases have treated such a loss as due to a war peril, as being a consequence of the warship's operations which are treated as warlike operations though prima facie the collision is a peril of the seas within the clause. But the authorities have given a further extension to the scope of these words. In certain circumstances a trading or merchant vessel has been held to be for purposes of the war risk clause engaged in a warlike operation. As illustrative of these circumstances, I may take those of a merchant ship carrying troops, ammunition, guns, tanks, or other military machines or equipment to a theatre of war or away from a theatre of war as in the evacuation of the British forces from Norway, Greece or Crete or elsewhere. Such a vessel may be regarded pro hac vice as serving the belligerent purposes of the country and as taking her share in hostilities against the enemy. She is, therefore, it is said, to be deemed to be engaged on a warlike operation within the meaning of the war risk cover. So it has been laid down by this House under T99, the charterparty used in the last war. If that vessel is lost or damaged or damages other vessels by reason of the acts which she does in executing the warlike operation, the loss or damage is held to be the consequence of the warlike operation. I must attempt to trace the development of this application of the words by reference to authorities in this House arising out of the last war. I have not attempted to collect or analyse or record all the observations which are contained in the actual judgments or opinions. In many cases reconciliation is impossible. What matters is the decision.

At first an attempt was made to extend the words "consequences of warlike operations" to increased dangers of navigation due to wartime conditions. This attempt, however, failed. In *Britain Steamship Co., Ld.* v. *The King* (*The Petersham*) (1) it was unsuccessfully urged that sailing without lights involved an extra peril which should be considered to be a consequence of hostilities or warlike operations. A more difficult problem was presented in *Green* v. *British India Steam Navigation Co., Ld.* (*The Matiana*) (1) reported along with that case. The facts were up to a point practically identical with those of the present appeal. The *Matiana* was proceeding in convoy down the Mediterranean, bound from Alexandria to a

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(1) [1921] 1 A. C. 99.

British port with a cargo of cotton. It was not suggested that either of these ports was a war base in any sense of which that obscure word is susceptible. Under orders of the officer commanding the convoy she was proceeding without lights by a course more northerly than the ordinary peace-time course because of the presence of submarines. She struck a small unlighted reef called the Keith Reef, round which it was said that currents were uncertain both in strength and direction. Negligence was negatived. Bailhache J. held that the loss was by a consequence of warlike operations. That decision was reversed by the Court of Appeal whose decision was affirmed by a majority of three to two by this House. The crucial question was whether the vessel was engaged on a warlike operation. The majority of their Lordships held that as regards the convoyed merchantmen, sailing without lights, and in convoy and by an unusual route under naval orders did not constitute a warlike operation. That case is to be distinguished, according to the authorities to which I now refer, from the present case because of the nature of the cargo of the *Matiana*, which was cotton, and because neither her port of departure nor her port of arrival was a "war base."

These decisions appeared to put an end to an extension of war risks beyond the ordinary sense of enemy attack or combative action in all their possible varieties as illustrated in the earlier cases, but there was a further development. This development in construing what is meant by "consequences of warlike operations" is seen in two cases, reported together, *Attorney-General* v. *Ard Coasters, Ld.* and *Liverpool and London War Risks Insurance Association, Ld.* v. *Marine Underwriters of s.s. Richard de Larrinaga* (1). In each of these cases a British merchant vessel was run into by a war vessel. In each case the collision was at night and the vessels concerned were sailing without lights. In the former the destroyer *Tartar*, while on patrol duty and in the act of turning at the end of her beat, ran into the *Ardgantock*. In the latter *H.M.S. Devonshire* ran into the *Richard de Larrinaga* while the warship was proceeding to Halifax, N.S., to pick up a convoy. The warship in either case was held to be engaged in a warlike operation and the collision was held to be due to the war vessel "moving in the course of its warlike operation" and to be a consequence of warlike operations. I have already quoted the language of Lord Finlay in his opinion. Lord

(1) [1921] 2 A. C. 141.

Dunedin summed up the position briefly (1). After observing that the *Matiana* case (2) was a clear decision that the escorting vessel of a convoy is engaged in a warlike operation while the escorted vessel is not, he said, the *Devonshire's* "commission "to convoy covered her proceeding to the place where she was "to pick up the convoy, and accordingly I think it comes "within the decision in the *Matiana* case (2) that she was "engaged in warlike operations." The next development came through treating a merchant vessel as being on the same footing as a war vessel simply because of the cargo she was carrying and the character of the place of departure or destination. Once it was determined that she was to be treated as on this footing it did not matter (so it was held) that the sea peril, collision or the like, was, apart from the special character attributed to her, merely an ordinary marine casualty, the occurence of which was in no way influenced by the nature of her cargo, or, indeed, her ports of sailing or destination, except in the sense that she was being navigated on the particular voyage. This was a big step, which was taken once for all in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service, The Geelong* (3). That vessel, carrying a cargo of cotton which was not identified with warlike service, to Gibraltar for orders, was run down and sunk in the Mediterranean by the *Bonvilston*, a British merchant vessel bound from Mudros to Alexandria, both ports being held to be war bases, under requisition by the government and carrying a cargo including ambulance wagons and other government stores. There was no negligence on the part of either vessel. The appellants, the Australian government, had requisitioned the *Geelong* under a charterparty construed as for this purpose of the same effect as T99. The House rejected the argument for the appellants that the *Bonvilston* at the time of the collision was navigating the sea like any other vessel and the fact that she was carrying ambulance wagons was accidental and could not convert a marine risk into a war risk. Lord Sumner said (4): "The "*Bonvilston* would have behaved in exactly the same way, if "she had been carrying a purely commercial cargo between "exclusively mercantile ports. The difficulty is to distinguish "this case, if not from previous decisions, for none quite cover "the point, at least from dicta more or less closely involved

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(1) [1921] 2 A. C. 152.
(2) [1921] 1 A. C. 99.
(3) [1923] A. C. 191.
(4) Ibid. 208.

"in them." But he concurred in the decision of the House that the loss of the *Geelong* was due to a consequence of warlike operations, which he described as an expression deliberately wide and incidentally rather vague. This case was shortly afterwards followed by *Attorney-General* v. *Adelaide Steamship Co., Ld., The Warilda* (1). That vessel, which had been requisitioned by the British government under T99, sustained damage owing to her running into the *Petingaudet*. The collision was due to her negligence, but, as the casualty was caused by the act of those on the *Warilda* in directing her course through the water in execution of a warlike operation, namely, the carriage of wounded soldiers from France to Southampton in March, 1918, it was held that the damage was a direct consequence of the operation and recoverable under T99. I have already quoted Lord Sumner's summary of the gist of the case. That the loss was caused by the negligence of the suppliant's servants was immaterial. That was merely an application of the ordinary rule that in marine insurance claims it is generally immaterial that the loss was attributable to the negligence of the plaintiffs or their servants. What are material are the event and its objective cause. Negligence is not a cause for this purpose. On the question of what was the quantum of loss recoverable it was held that the owners of the *Warilda* had not, under T99, a right to be indemnified against their liability to the owners of the *Petingaudet* for the damage to their vessel by negligent navigation because that lay outside the scope of the f.c. and s. clause: *Adelaide Steamship Co., Ld.* v. *Attorney-General* (2).

There were two other cases arising from the last war which after some delay came to this House. One was *Board of Trade* v. *Hain Steamship Co., Ld.* (3), where the *Trevanion*, a British merchant ship, when under requisition under T99, was after the armistice run into by a United States navy mineplanter, the *Roanoke*. Both vessels were to blame. It was held that the owners of the *Trevanion* were entitled to recover under T99 because she was damaged by the act of the *Roanoke* when the *Roanoke* was engaged on a warlike operation. The fact that both vessels were negligent was not material. In *Clan Line Steamers, Ld.* v. *Board of Trade* (4), the *Clan Matheson*, the vessel which was sunk, was not engaged on a warlike operation, while the other vessel, the

(1) [1923] A. C. 292.
(2) [1926] A. C. 172.
(3) [1929] A. C. 534.
(4) [1929] A. C. 514.

Western Front, was. The casualty occurred in May, 1918. Both vessels were sailing in the same convoy from the United States, bound to ports in France. The *Western Front* was held to be engaged on a warlike operation because her cargo was entirely made up of war supplies for the forces of the United States government, and she was bound to St. Nazaire which was a war base. The nature of the *Clan Matheson's* cargo was not such as to make it proper to treat her as engaged on a warlike operation. It was held that, as the collision was solely due to the breakdown of the steering gear of the trading or non-warlike vessel, the *Clan Matheson,* it was not the consequence of a warlike operation. Nothing done or not done by the *Western Front* could be regarded as the cause of the casualty.

I have gone through these authorities to show why, in my opinion, it is fallacious to require a connection between the casualty—stranding, collision or the like—and the nature of the cargo being carried or the termini of the voyage. The nature of the cargo is, indeed, material at an earlier stage of the inquiry, the stage when what is being ascertained is whether there was a warlike operation. This, as the cases clearly show, does depend on the nature both of the cargo and the voyage. The theory as to liability which is developed in these authorities may seem arbitrary and artificial, but it is clear and consistent. In my opinion, it completely covers the present case.

I must, however, examine more closely one point emphasized by MacKinnon L.J. as an argument to refute the principles which I have been deducing from the authorities. He asks (1) what is the position if a tremendous sea carries away the bridge of a vessel engaged on a warlike operation. Is that a consequence of a warlike operation within the principle? This objection, if valid in the case of a stranding, would be equally valid in the case of a collision, but it has not so far prevailed or even been suggested in any of the collision cases to which I have referred. It does, however, raise a serious question on the construction of the clause in T773 as to the extent or class of damage recoverable under it. It might be said that, if the analogy is pressed home, it would follow that every sort of damage by sea perils, great or trivial, would properly be treated as a consequence of a warlike operation if the vessel is at the time engaged on a warlike operation. No one, so far as I know, has suggested so drastic a logic.

(1) [1942] 1 K. B. 35, 45.

H. L. (E.)

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YORKSHIRE DALE STEAMSHIP CO. v. MINISTER OF WAR TRANSPORT.

Lord Wright.

The parallel between the warship and the merchant ship has up to now been limited to cases of collision, or cases resembling collision, such as stranding. I do not see why the principle should be extended any further or beyond the point to which the cases have carried it. It might, indeed, be said that damage by heavy weather is consequent on the ship moving while executing her warlike operation to the position where she was damaged by the heavy sea. In particular, it might plausibly be said that, if she were deliberately forced at full speed ahead when a prudent navigator would heave to, or deliberately taken in the area of a cyclone for some warlike purpose, resulting damage would be a consequence of warlike operations. That may be so, though such special cases would not meet the general problem put by MacKinnon L.J., which does not depend on such special conditions. There are, however, I think, obviously some damage claims in the case of a requisitioned ship while engaged on a warlike operation which do not come within the war risk provision. Thus, a fire accidentally caused on board, or accidents within the Inchmaree clause, or leaks due to inherent defects in the hull, would not seem to me, as at present advised, to come within the war risk cover in any event. The basis of the decisions seems to be that the casualty can be traced to definite action on the part of those on board the warship or quasi-warship (if I may use that term) in directing the course of the vessel to carry out the warlike operation. Such instances of damage as I have just given seem to me, as at present advised, to fall outside the rule. What is being discussed is not a general principle of law, but the construction of words which have been in common use during the last war and this war. The words are, indeed, wide, but they have to be construed in accordance with the general purpose of the contract and the common understanding of commercial men, in short in the same way as any other part of the law merchant. So far, they have not been construed as applying to the impact of water or to the case put by MacKinnon L.J., even though it might be said that the heavy sea struck the vessel because she had been brought to that very point of the ocean in pursuing the warlike operation. My own view at this moment is that this absence of precedent is no accident, but is due to the fact that the hypothetical case is outside the contemplated purview of the words, however the matter might be regarded on lines of exact logic. But logic in law is not exact. A heavy wave may, no doubt, be a damaging and destructive agent, but the impact of a heavy sea is, I think, different in character from the contact with a hard object, such as there is if there is a collision or stranding. The wave is not something which has a definite local position. It momentarily rises and disappears. What is true of a heavy wave should logically be equally true of a small wave which may do damage. I cannot conceive such damage being treated as a war risk loss. The question is not material here, and I do not think it right to pronounce any final opinion. I concur in the motion proposed.

Lord Porter. My Lords, The question for your Lordships' determination has often been discussed both before and as a result of the last war, and your Lordships are not without guidance on it, but causation and its incidence is a thorny subject and each fresh case opens up new matter for consideration. It has more than once been asserted that the difficulties are of man's contriving, and that a carefully drawn war risks clause would enable any court to see at once by what the loss was caused, whether by marine or war risks. To hold this view is, I think, to confuse language and substance. Of course, if it were possible for the human mind to visualize every incident which might happen, a long and intricate list of those matters which are to be included under one head or the other might be compiled, but, in the first place, it is impossible to foresee all events and inevitably many items would be left out, and in any case the list would be intolerably long. The fact is that there is no form of words in which underwriters and insured can express themselves so as to convey with precision what they mean to include in war risks. Indeed, I do not think that they themselves know exactly what they desire to embrace in the cover furnished, and I fancy that they best convey their intention by using the somewhat vague words in which this present clause is expressed, leaving it to the courts by a series of decisions to determine the line of demarcation between the two forms of risk. At any rate, from the date of the decision in *Ionides* v. *Universal Marine Insurance Co.* (1), until the present time they have had some eighty years in which to find a better formula and have not succeeded in doing so.

For your Lordships' purpose the matters excepted out of the cover given by an ordinary Lloyd's policy are "the "consequences of hostilities and warlike operations," and it is accepted in this case, as it generally has been since *Ionides* v. *The Universal Marine Insurance Co.* (1), that the question at issue is best approached by regarding the war risk insurance as covering the risks excepted and holding the Crown free from liability in any case in which the assured cannot show that the loss which they claim was so caused. "Warlike "operations" has generally been considered a phrase of wider meaning than "hostilities," and it will, I think, suffice to reach a conclusion whether the loss of the *Coxwold* was due to risks included in the first-mentioned phrase.

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(1) 14 C. B. (N. S.) 259.

As I have said, some considerable guidance has been afforded to your Lordships by previous decisions of this House and one can, I think, tabulate certain conclusions which have finally been reached. (1.) In this, as in every other insurance problem, the proximate cause is alone to be looked at: *Ionides* v. *The Universal Marine Insurance Co.* (1). (2.) But the proximate cause is not necessarily the nearest in point of time. It is the dominant cause. *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (2); *P. Samuel & Co.* v. *Dumas* (3). (3.) In the case of a ship proceeding on a voyage which is not itself a warlike operation, absence of lights, sailing in convoy, and zigzagging are not separately or in combination a warlike operation, nor, indeed, is it a warlike operation to follow the course set by the naval officer in charge of the convoy: *The Petersham* and *The Matiana* (4). (4.) The dimming or extinguishing of a shore light is a warlike operation, but, if a ship engaged in a mercantile operation goes ashore because she is out of her reckoning, she is not lost by the warlike operation merely because she would most probably have realized and avoided the danger had the light been seen: *Ionides* v. *The Universal Marine Insurance Co.* (1). (5.) A ship carrying war stores from one war base to another is engaged on a warlike operation: *The Geelong* (5). (6.) A collision caused by a ship so engaged is caused by the warlike operation: *The Ardgantock* and *The Richard de Larrinaga* (6). (7.) A collision solely caused by a ship engaged on a mercantile adventure is not caused by a warlike operation even though that ship collides with or is struck by one engaged on a warlike

(1) 14 C. B. (N. S.) 259.
(2) [1918] A. C. 350.
(3) [1924] A. C. 431.
(4) [1921] 1 A. C. 99.
(5) [1923] A. C. 191.
(6) [1921] 2 A. C. 141.

operation: *The Clan Matheson* (1). (8.) If the collision be caused both by the ship so engaged and by one not so engaged so that both were effective causes of the disaster the consequent loss is due to the warlike operation: *Board of Trade* v. *The Hain Steamship Co., Ld.* (2). (9.) The collision, if due in whole or in part to the action of the ship engaged in a warlike operation, does not cease to be caused by the warlike operation by reason of the fact that that action is negligent: *The Warilda* (3).

Having regard to the observations of Viscount Cave in *The Petersham* and *The Matiana* (4), when he quotes with approval the statement that almost any movement of a warship of a belligerent power by sea in time of war is a warlike operation, and to the decisions in *The Geelong* (5) and *The Warilda* (3), the admission that the *Coxwold* was engaged on a warlike operation at the time of her stranding was, I think, properly and necessarily made even after due weight is given to Lord Sumner's statement (6) in the two former cases that "not everything done by a King's ship "or a King's officer in time of war is necessarily a warlike "operation or the consequence thereof." Whether that operation caused the loss is a different matter. In considering the latter point it is, in my view, important to remember in what the warlike operation consists. In the present case it is admitted to be the proceeding from one war base to another war base with military stores for the use of the British forces in the field. Bearing this fact in mind, the question before your Lordships resolves itself into an inquiry whether the loss was caused by proceeding on that voyage. Lord Sumner dealt with the matter both in *The Warilda*, where he said (7): "As each vessel in proceeding to the point of collision was "proceeding on her voyage, ... it was part of the operation, "in which each vessel was engaged, to proceed to that point. "By admission the *Warilda's* operation was a warlike operation "throughout, and as was the whole so were the parts. Steam-"ing into the *Petingaudet* was one of those parts and none "the less so whether it was due to mere misfortune, to error "of judgment, or to negligent navigation," and in the *Board of Trade* v. *The Hain Steamship Co.* (2), where his words are:

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(1) [1929] A. C. 514.
(2) [1929] A. C. 534.
(3) [1923] A. C. 292.
(4) [1921] 1 A. C. 99, 109, 110.
(5) [1923] A. C. 191.
(6) [1921] 1 A. C. 99, 129.
(7) [1923] A. C. 292, 301.

"The whole voyage of the *Roanoke* and therefore this part of "it was a warlike operation and from losses so caused the "policy is warranted free." With this may be compared the words spoken in the Court of Appeal by Lord Atkin, then Atkin L.J., in *The Ardgantock* (1) and quoted by Viscount Finlay in his speech in your Lordships' House (2): "The "injury to the *Ardgantock* was proximately caused by the "impact of the war vessel moving in the course of its warlike "operations. It seems to me unnecessary to consider whether "the *Ardgantock* was sailing without lights by reason of her "being engaged in a warlike operation or by reason of her "being engaged in a peaceful operation. The injury was "directly due to the warlike operation of the *Tartar* just as "it would have been, in my view, if the *Tartar* had been "herself injured by running into an unlighted wreck or other "peril of the same kind. The *Tartar* would have avoided the "peril if she had received timely warning by lights or otherwise "of the presence of the *Ardgantock*, but that she had in the "course of her warlike operations to proceed without such "warning and to expose herself and others to risk of injury "is one of the risks of the warlike operation."

The logical conclusion of these observations would seem to be that, in a case where the warlike operation consists in passing from one war base to another, any accident due to proceeding between the starting and finishing points is caused by the warlike operation, but the statements must be read in the light of the qualifications put on them by Lord Sumner in *The Warilda* (3) and of the decision and reasoning in *The Clan Matheson* (4). In the former case Lord Sumner says (5): "When damage is done by two ships coming into collision, "the one being engaged in a warlike operation, and the other "on an ordinary commercial voyage, the collision is a risk "falling on the marine policy, unless it is taken out of it by "being proved to be caused by warlike operations, and this "proof fails, when it is shown to be caused by the action of "the officer in charge of the commercial operation, all the more "so if his action is negligent and blameworthy: but I think "the result would be the same, if his action was only an error "of judgment or wrong but excusable in what is called the "agony of the moment, so long as it is his action that causes

(1) 36 T. L. R. 555, 557.
(2) [1921] 2 A. C. 148.
(3) [1923] A. C. 292.
(4) [1929] A. C. 514.
(5) [1923] A. C. 292, 305.

"the collision effectively and proximately." The decision in *The Clan Matheson* (1), by which your Lordships are bound, supports and enforces this view, though it perhaps requires some modification because action taken in the agony of the moment can seldom if ever be the effective cause of a collision, since that action is dominated by the previous action of the other vessel, but this is immaterial to the present inquiry. Side by side with this observation may be set that on the same page: "Negligence may be material as going to "inevitability, where the inevitability of a series of consequences "is part of the proof that a more distant occurrence was truly "the proximate cause of the ultimate result."

Proof, then, is required that the damage claimed for was caused by the warlike operation. Stranding, it is true, is normally a marine risk just as a collision is, but it may, nevertheless, be effectively caused by a warlike operation where that operation is the proceeding from one war base to another and the stranding takes place as a result of so proceeding. This type of case differs, as I think Lord Sumner recognizes, from those cases in which, as in *Ionides* v. *The Universal Marine Insurance Co.* (2), the only warlike operation was the darkening of the light on Cape Hatteras and where, inasmuch as the ship's captain had missed his reckoning and either did not keep a sufficient look-out or lie to when his position was doubtful and so ran ashore, it could not be said that the absence of the light was the proximate cause of the loss. So in *Innui Gomei Kaisha* v. *Attolico* (3), the only warlike operation suggested was the sailing of two ships on a commercial adventure without lights, and, even assuming so sailing to be a warlike operation, that operation did not cause the loss because the ships were able to see one another in ample time and could have avoided the collision if they had taken appropriate steps. It was failure to do so and not absence of lights which caused the collision.

The earlier quotations which I have set out show that where the warlike operation is the progress of the ship through the water, Lord Sumner would have taken a different view. Indeed, he recognizes in the remarks last quoted that an earlier event may be the efficient cause of a loss as, e.g. (to quote an illustration from *Ionides* v. *The Universal Marine Insurance Co.* (2)), in the case of a ship driven into a bay by

(1) [1929] A. C. 514.

(2) 14 C. B. (N. S.) 259.

(3) (1919) Unrep. (Lloyd's List Newspaper, Feb. 10).

a hostile cruiser and unable to get out because of the weather. In such a case, owing to the physical conditions, the loss which followed the action of the hostile cruiser was inevitable, but if by proper exertions the master could have brought his ship safely out, the loss would not be consequent on warlike operations but the result of his own failure to take the appropriate steps.

Applying this reasoning to the present case, I should be prepared to hold that almost any casualty befalling a vessel as a result of her own action in proceeding on a voyage, in a case where proceeding on that voyage was a warlike operation, was caused by a warlike operation, and, like Lords Atkin and Finlay, I am unable to distinguish between damage to either or both vessels in a collision with the ship engaged on a commercial adventure due to the action of a ship engaged in a warlike operation and a stranding due to such action. I take the same view whether the misfortune was due to negligence or was accidental or inevitable, but, though a casualty may in such circumstances happen to or by the action of a ship engaged in a warlike operation, it may, I think, not be due to the progress of that ship through the water but to some other cause as, e.g., in the case of the *Clan Matheson*, where as it was said the collision with the *Petingaudet* was only incidental and the ship, owing to her own misfortune, was already a lost ship before the collision took place. It may be that if a vessel, even when engaged on the warlike operation of proceeding from one war base to another, suffers damage by a definite external event, unexpected and unavoidable, in which the damaged vessel was not an active participant but a quiescent sufferer, the loss should be attributed to that event and not to the passage of the ship through the water. Examples can be found in the calamity encountered by the *Clan Matheson* and the *Western Front*, where the sole cause of the collision was the accidental jamming of the steering gear of the former vessel from which both she which was not and the other ship which was engaged in a warlike operation incurred loss, and, perhaps, in the case, envisaged by the Court of Appeal, of a ship overwhelmed by the action of the sea and by that alone. In dealing with the present case, however, I do not desire to express a final opinion on these matters, merely adding that I do not think it impossible to argue that the loss of the *Western Front* or of the vessel so overwhelmed should be attributed to the warlike operation

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which brought the vessel to that place at that time and exposed her to the consequent risk.

In the present case it has been thought by the Court of Appeal, as I understand them, that the arbitrator found the sole, or at any rate the dominant, cause of the loss to be an unexpected set of the tide, and that such a cause was a definite external event unconnected with the warlike operation. I do not so understand him. One must, I think, take the whole story—a ship sailing on a warlike operation at speed in dangerous waters where unexpected currents might be found, in convoy without lights, following an ordered course and deviating from it again under orders to avoid actual or imagined submarine attack. I do not think that any one of these factors can be neglected in arriving at the cause of the loss. If the *Coxwold* had been on an ordinary mercantile voyage no doubt, as a result of the decisions in your Lordships' House, the risk would be a marine one, whether its cause was absence of lights or sailing in convoy or obeying the orders of the commodore vessel or inability to see the Neist light because it was dimmed, but in the circumstances the cause of the *Coxwold* being at that place at that time in those conditions was her warlike operation, and the loss was, in my view, not only in the course of but caused by that operation. That the Court of Appeal thought otherwise was, I venture to suggest, due to the importance which they attached to the arbitrator's finding as to the set of the tide as against the totality of circumstances relied on by him. Moreover, in my view, they did not give sufficient weight to the fact, as admitted and found, that the warlike operation consisted in sailing from one war base to another. I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Holmes, Fenwick & Willan.*
Solicitor for respondent: *Treasury Solicitor.*

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